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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

F. P. TALKINGTON, *et al. Appellants,*
vs.
HENRY M. DUMBLETON, *Appellee.*
No. 968.

Appeal from Circuit Court of the United States for the District of Oregon.

Motion of Appellee to Dismiss the Appeal; Appellee's Brief thereon; Excerpts from Record on Points.

FRANK V. DRAKE,
Attorney for Appellee.

BYRON S. ADAMS, PRINTER.

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Appeal from Circuit Court of the United States for the District of Oregon.

MOTION OF APPELLEE TO DISMISS THE APPEAL:

Now comes H. M. Dumbleton, appellee, by Frank V. Drake, his attorney, and respectfully suggests to the Hon. the above named Supreme Court, that it appears upon the face of the record herein that the matter in dispute on this appeal does not exceed the sum or value of $5,000, and further that said appeal is colorable only and is mainfestly frivolous and taken for the purposes of delay.

Wherefore, appellee moves the Court that said appeal be dismissed, with costs and damages to appellee, on the ground that the matter in dispute in this Court on said appeal does not exceed the sum or value of $5,000.

And said appellee, by his said attorney, further moves the Court, under the rules thereof, to affirm the decree of said Circuit Court, with damages and costs to appellee, on the ground that this appeal was manifestly taken for delay, and that the question of the jurisdiction of this Court over the case, relied upon by appellants is palpably frivolous, and that the proceedings by appellants are not taken *bona fide*.

FRANK V. DRAKE,
Attorney for Appellee.

IN SUPREME COURT OF THE UNITED STATES.

October Term, 1887.

F. P. TALKINGTON,
D. MARX, AND
E. C. JOERGENSEN, *Appellants*,
vs.
H. M. DUMBLETON, *Appellee.*
} No. 968.

Appeal from the Circuit Court of the United States, District of Oregon.

Brief for Appellee, on motion to dismiss Appeal:

STATEMENT OF THE CASE.

Equity in Court below to determine a trust-estate in, and to compel a re-conveyance by the trustee of a moiety in lands to

the equitable owner (appellee) with accounting; and to obtain cancellation of a mortgage executed by the trustee to his co-defendants (and co-appellants.)

The Complaint in substance charges that on February 23, 1885, the complainant (appellee here) being the owner of a moiety in specified lands, was, by certain false, deceitful and fraudulent representations and practices of defendant Talkington (appellant), induced to convey the same, to said Talkington, in exchange for a property and business of Talkington, which was comparatively valueless. That said Talkington, immediately thereafter encumbered the lands so conveyed to him, by mortgage to his co-defendants (and co-appellants), Marx and Joergensen, partners, in the sum of $890, and that Marx and Joergensen were at all times cognizant of the frauds of their co-defendant; concluding in usual form of demand for re-conveyance with tender of accounting and refusals of defendant.

THE SUM OR VALUE IN CONTROVERSY: Complainant (appellee), in his bill places the value of his estate in the lands at $7,000 (see appendix, hereto, page 2), and charges that through the misrepresentations and frauds of defendant Talkington as to the value of the property and business transferred by Talkington to complainant for his lands, he on February 23, 1885, was induced to convey and did convey his lands to Talkington in exchange for property and business which proved to be comparatively valueless.

The answer admits the ownership of the estate in the lands to have been in complainant (appellee) till the conveyance thereof to Talkington, but denies "*that said property or complainant's interest therein, was on February* 15, 1885, *or at any time since has been of the value of* $7,000, *or of any greater value than* $4,000," (See appendix hereto, page 13), and the answer thereupon sets up matter tending to show that the property and business exchanged by Talkington for the lands equaled the value of the land, viz: $4,000 (see appendix, page 19 to 21), and concludes with averment that at the time of

the transfer complained of "the said saloon, stock in trade and the good will thereof was of the value of at least $4,000" (appendix page 21, *italics my own*).

Marx and Joergensen answered setting up the mortgage for $890, executed to them by Talkington.

Complainant responded with replications.

The pleadings were verified by the respective parties in person.

Upon the issues thus joined, the cause went to an Examiner who took the testimony and reported the same to the Court.

The testimony touching the value of complainant's interest in the lands "the sum or value in controversy" will be found in the appendix hereto pages 25 to 29, complainant producing three witnesses, including himself; and defendant calling six witnesses, including himself, and introducing a lease of the premises; this evidence was conflicting, that of defendant tending to show that the value of the land was less than $5,000.

The Court found as a fact, that complainant's interest in the lands was $5,000 and no more, (finding 2 appendix page 30), and decreed a reconveyance of the title by defendant to complainant *upon the payment of* $812 *by complainant to defendant Talkington.* (Appendix page 34).

This motion of appellee that the appeal be dismissed, is made under a stipulation (appendix page 35), and the assumption that appellant will tender to this Court one or more affidavits taken *ex parte,* since the appeal was perfected, to the effect that the property in controversy, is in fact of a value greater than $5,000, and this, notwithstanding the denials of defendants in their pleading, the testimony of their witnesses called for the purpose, and the adjudication of the Court in their favor in that behalf.

THE RECORD ANNEXED: The pleadings and findings of the Court, in full, and so much of the evidence as was adduced at the trial on the question of the value of the property is an-

nexed hereto in form of an Exhibit, and references thereunto made.

(The use of italics has been adopted to aid in references).

POINTS AND ARGUMENT.

It is claimed on behalf of appellee:

1. That upon the record the cause does not fall within the jurisdiction of this Court.

2. That affidavits cannot be here received to contradict the record, or impeach the findings of the Circuit Court.

3. That appellants, (if willing), will not be permitted here to falsify the pleadings or issues by them urged upon and tried out by the Court below.

4. That this is a case and instance wherein both costs and damages should be awarded against appellants under the statutes and the 6th rule of this Court.

To the first point.

The issues presented, tried and determined below, were: (1), the value of complainant's interest in the lands; the value of defendants property exchanged for the lands, thus determining an element or badge of fraud, viz: inadequacy of consideration: (2), the existence of actual frauds charged in the bill; (3), accounting between the parties.

Upon these issues and the proofs adduced, the Court below entered a decree from which it appears that the amount, or value in controversy does not exceed $5,000.

The rules for the determination of the question of jurisdiction in this Court in such cases have been "too long settled to require discussion." Complainant in his bill stated that at the time of the transaction complained of his interest in the lands was worth $7,000, (appendix page 2).

This allegation is met by denial of defendant who further avers that complainant's estate in the lands did not exceed $4,000, (appendix page 13).

Complainant charges that the property received by him from Talkington in exchange for the lands did not exceed in value $1,000, (appendix page 6): Defendant avers in response that the property so exchanged was of the value of at least $4,000, (appendix page 21). Thus was this issue as to the *consideration received by complainant* presented. Proofs in *extenso* were presented thereon, (appendix pages 25 to 29). The Court on the evidence found the value of the lands to be $5,000 and no more (finding 2 appendix page 30), and the value of the property exchanged by defendant Talkington therefor to be $1,500, (appendix page 31), and after adjudging the existence of fraud as charged, and the adjustment of intermediate accounts between the parties entered a decree that upon payment by complainant to defendant Talkington of $812, he (Talkington) reconvey the lands to complainant. Thus it appears, that *as to defendant*, there has not been, nor is there now a controversy in amount or value exceeding $5,000.

finding 4

In the case of Merrill *vs.* Petty (16 Wall. 338) which was libel in *personam* with decree below for $1,292.84, on a motion to dismiss the appeal the Court at pp. 344–5 concisely stated the rules upon which appellee relies, in this language:

"Much discussion of that question is certainly unnecessary, as the rule in this Court has been settled for the period of sixty years, that where the writ of error is brought by the defendant in the original action, the matter in dispute is the amount of the judgment rendered in the Circuit Court, as this Court can only affirm the judgment rendered in that Court.

"Attempt was subsequently made, it must be admitted, to call in question the rule established in those two cases (3 Pet. 34; 7 Cranch, 276), but this Court re-affirmed the rule in the most authoritative manner, deciding as follows:

(1.) "That the amount required is to be ascertained and determined by the sum in controversy at the time of the judg-

ment in the Circuit Court, and not by any subsequent additions thereto, such as interest.

(2.) "(Gives rule where plaintiff is appellant.)

(3.) "That if the verdict is given against the defendant for a less sum than $2,000, and judgment is rendered against him accordingly, that, in that state of the case, nothing is in controversy between him and the plaintiff, if the plaintiff acquiesces in the judgment, beyond the sum for which the judgment is given, and consequently the defendant is not entitled to any writ of error."

See Hilton *vs.* Dickinson, 108 U. S., 165.

In Thompson *vs.* Butler (95 U. S., 695) a verdict was rendered at the trial against Thompson for $5,066.17. Butler remitted $66.17, and took judgment for $5,000. Thompson brought the case to this Court on writ of error. Butler moved to dismiss because the matter in dispute did not exceed $5,000. The Chief Justice in announcing the decision of the Court sustaining the motion again declared the rule: "As the writ of error was sued out by the defendant below, the amount in controversy was *fixed by the judgment*" citing (Merrill *vs.* Petty and other cases.)

So, also in the case of Walker *vs.* U. S., 4 Wallace, 163; and cases there cited.

"Nothing but the judgment is in dispute between the parties."

Gordon *vs.* Ogden, 3 Pet., 33.

Knapp *vs.* Banks, 2 Howard, 73.

The case of Lamar *vs.* Micou (104 U. S.) is strikingly analogous to this upon the principle relied upon by appellee. No set-off, counter claim, or affirmative matter, or plea is set up by defendants involving the jurisdictional sum. There are but the denials that the property exceeds in value the sum of $4,000, and of the facts and equity charged in the bill. Defendant Talkington sought nothing below but to reduce the claim of value of the land (and his corresponding liability thereon), and to defeat the suit. They succeeded by denials

and proof in reducing complainant's claim of the value in controversy, and *pro tanto*, defendant's liability to account therefor. So that the following language used by this Court in dismissing the appeal in Lamar *vs.* Micou is especially applicable here:

"This is an appeal by the defendant below from a decree against him for less than $5,000. There is no claim of set-off, or counter claim, except to reduce the amount of the recovery. In no event can he get any money decree in his favor. All he seeks to do is to defeat the claim of the appellee. Consequently the amount in controversy so far as this appeal is concerned *is fixed by the decree* (citing cases). *In effect he insists that, under the rule of liability established against him in the Court below, the decree should have been for more than* $5,000, *and that for this reason he is entitled to an appeal, so that he may show he is not liable at all. This, we think it clear is not the law.*"

The concluding sentences of the foregoing paragraph are italized here, because they are particularly apt, and are referred to hereafter, viz: on the second point in argument.

In all the cases, it is safe to say that this Court has always tested its jurisdiction by the record *unless* the record is silent. I have found no case *contra*.

Proceeding upon the controversy presented in the pleading, tested by the rule applied in Gray *vs.* Blanchard, 97 U. S., 564; Tintsman *vs.* National Bank, 100 U. S., 6; Hilton *vs.* Dickinson, 108 U. S., 165 and James *vs.* Citizens National Bank, 110 U. S., 52; the amount in controversy at most is but $3,188. Complainant alleged the value of his interest in the lands to be $7,000. Defendant admitted the value to be $4,000, but denied further value. The Court found, as a fact, that complainant's interest in the lands was of the value of $5,000, and no more, and decreed a a re-conveyance upon payment by complainant of the sum of $812.

Thus the amount upon which appellant presents a controversy here is insufficient, whether his pleadings be considered as a basis, or the findings of the Court be adopted.

Dows and Another *vs.* Johnson, 110 U. S., 223, seems to be conclusive on this point.

THE APPEAL AS TO MARX AND JOERGENSEN: The amount in controversy as to the co-appellants Marx and Joergensen is measured by their mortgage, which is but for the sum of $890 (appendix page 22, answer of Marx and Joergensen and finding of Court No. 8, appendix page 32).

"When the object of a suit is to apply property worth more, to the payment of a debt for less than the jurisdictional amount, it is the amount of the debt, and not the value of the property that determines the jurisdiction of this Court."

(Gibson *vs.* Shufeldt, 122 U. S., at page 29, citing Farmer's Bank of Alexandria *vs.* Hoff, 7 Pet. 168.)

Clearly, Marx and Joergensen, as well as their co-appellant, are here upon the most frivolous of pretexts, seeking delay.

That the several defendants cannot join in appeal and thereby increase the amount in controversy is settled.

Russell *vs.* Stansell, 105 U. S., 303.
Ex parte B. & O. R. R. Co.
Adams *vs.* Crittenden.

THE RECORD IS CONCLUSIVE AS TO JURISDICTIONAL AMOUNT.

SECONDLY: Appellants having in the stipulation (appendix pages 35, 36) and otherwise expressed intention to tender affidavits to the effect that the value of the moiety of the lands in controversy exceeds the jurisdictional sum, thereby to establish the jurisdiction of this Court over the case, appellee excepts to such tender and insists that such affidavits cannot be received or considered; that the record in this case discloses a solemn adjudication of the Court below upon the point which is conclusive, and that in such cases this Court upon reason and long established usage, will consider such record only.

In Richmond *vs.* City of Milwaukee (21 How., 391) the Chief Justice, in response to a petition (or motion) to vacate a

former order of dismissal of the appeal for want of jurisdiction, and to reinstate the case upon an affidavit showing the value of the property involved to be $2,500, declared: "where the value is stated in the pleadings or proceedings of the Court below, *affidavits have never been received to vary or enhance it, in order to give jurisdiction.* And the affidavit now offered could not have been received, even if filed before the argument of the case."

In 4 Cranch, 216 (U. S. *vs.* Brig Union) appellants *without objection* examined a witness *viva voce* in this Court as to the value of the subject of appeal. The record disclosed that an appraisement of the property involved had been made by an officer of the Court below, under its order. This Court adopted the *appraisement* made under the supervision of the Court below as the *best evidence,* and dismissed the appeal. Justice Johnson alone held a contrary view upon the grounds that "the appraisement was a thing not *perfected.* It was not acted upon, and might have been impeached."

In Gray *vs.* Blanchard (97 U. S., 564) and Banking Association *vs.* Insurance Association (102 U. S., 121) wherein it affirmatively appeared from the records that the amount in controversy was insufficient, this Court regarded only the record and dismissed the appeals; and in Webster *vs.* Ins. Co. (110 U. S., 386) it was declared that "*arrangements between parties contradictory to their pleadings, and so evidently made for the purpose * * * to bring it within the jurisdiction of this Court cannot be recognized here.*" The appeal was dismissed upon the jurisdictional facts appearing in the record. And in Lee *vs.* Watson (1 Wall., 337) the action was, originally, and in fact, to recover less than $2,000 (the then minimum sum.) Pending the trial below, by consent of parties, plaintiff's demand for damages was amended and enlarged to $2,100. Verdict for defendant. It appeared from the record and the judge's certificate that the jurisdiction of the appellate Court did not attach and the writ was dismissed.

Where the record is silent it must be conceded at once that affidavits can be received, the affirmative probably being upon him who invokes jurisdiction, but it is contended by appellee that no case exists where a judgment of the lower Court upon a point involving the jurisdictional amount here has been permitted to be assailed either directly or collaterally, in order that the jurisdiction of this Court might be invoked. Nor is there record of a proceeding in this Court, wherein it has permitted joinder of issue upon the truth or falsity of a finding or judgment below in order that your Honors might determine your jurisdiction in a cause. Surely, if one party may here attack the verity of a judgment or finding, the other may be permitted to sustain it, and thus would be evolved a new element of litigation and a course of procedure whereby the labors of this Court could be wholly devoted to trying out preliminary jurisdictional controversies.

Contradictory Affidavits Inadmissible.

Thirdly: If appellants shall insist on presenting the proposed affidavits, and claim thereon that the value of the interest in the lands exceeds $5,000, then it is submitted in addition to what was last suggested that they present an anomalous, and somewhat audacious proposition to this Court.

Under the sworn answer upon which the cause was tried in the Court below, the value of the property was asserted to be not over $4,000, and, to tender issue on the allegation of complainant of inadequacy of the consideration, defendant avered that the property exchanged for the lands was at least $4,000, (appendix pages 13, 21).

Seven witnesses for defense were called at the trial to prove the value of the lands to be less than $5,000, and numerous others to prove "adequacy of consideration." Success in part attended their efforts and the lands were adjudged to be of the value of $5,000 and no more.

So the proposition is here sharply presented: whether appellants can be permitted (even at their request) to come here, and thus stultify themselves; thus falsify their record below; thus assail the solemn judgment duly entered, and thus tender proof of a successful effort on their part to mislead and deceive the Court below. It must be conceded that such will be the logical and literal effect.

If this be permitted shall not appellee, (if he possesses the inclination) also be permitted to respond and introduce *ex parte* affidavits of unknown witnesses to *reduce* this jurisdictional valuation, even though the act should necessarily involve a disclosure of an inexcusable attempt on his part to mislead and deceive the Court appointed to try the issues *as presented to it?*

Estoppel lies against them.

The language hereinbefore quoted from the case of Lamar *vs.* Micou is especially apt and applicable here.

And to the point, upon principle, are cases hereinbefore cited, viz:

Richmond *vs.* City, 21 How. 391.
Webster *vs.* Ins. Co., 110 U. S., 380.
Gray *vs.* Blanchard, 97 U. S., 564.
Lee *vs.* Watson, 1 Wal., 337.
95 U. S., 695,

AGAIN: appeals in Equity are heard in this Court, upon the pleadings and proof below; *neither new evidence or amendments to the pleadings* are permissible here. (Pacific R. R. Co., *vs.* Ketchum, 95 U. S. 1; 92 U. S. 1; Section 998 Rev. Stat).

And it is submitted that this proposed new and contradictory evidence is inadmissible on the present condition of defendant's answer.

(It should be said, here, that the distinguished gentleman whose appearance was entered on the other side after the appeal was here, and for whom great respect is entertained, has, surely, up to this time, had no opportunity to become acquainted with the cause or the record in the case, and that the views expressed

herein proceed with the knowledge that the proposal to submit the class of affidavits referred to has been made without deliberate consideration).

If the affidavits be relied on to show that the lands have increased in value since the decree was entered, still the fact remains that the pleadings, record and evidence below can only be considered by this Court; and the objection still lies to the reception of proof of one state of facts to sustain jurisdiction, and the consideration of the converse thereof to defeat the suit. The rule in Lamar *vs.* Micou again applies.

Again: neither subsequent increase of value, accrued interest, or costs can enter into the computation in determining the jurisdictional amount.

Merrill *vs.* Petty, 16 Wal. 338.
Thompson *vs.* Butler, 95 U. S., 695.
Walker *vs.* United States, 4 Wallace, 164.
Knapp *vs.* Banks, 2 Howard, 73.
W. U. T. Co., *vs.* Rogers, 93 U. S., 565.

Any appreciation of value subsequent to the decree, may have been followed by depreciation of value subsequent to the affidavits.

Jurisdiction here cannot be determined by the fluctuations in value of property subsequent to decree below, for in such cases jurisdiction would be ousted or restored by the market rates of the property.

Costs and Damages Should be Awarded.

Finally it is submitted, that this case falls within the category referred to by the Honorable the Chief Justice in Whitney *vs.* Cook, (99 U. S. 607), and covered by rules 6 and 23 of this Court, and contemplated by the Statutes, (Rev. Stats., Section 1010, 1012). This case is here upon a supersedeas bond, the title to and right to possession of the lands being in the meantime in abeyance. The claim of right to file affidavits flatly

adverse to their proceedings below, is a confession by appellants of knowledge, that, upon the record, they are wrongfully here.

In Whitney *vs.* Cook, Mr. Chief Justice Waite, delivering the opinion of the Court, says :

"This is a motion to affirm only. Our amended rule 6 allows a motion to affirm to be united with a motion to dismiss. This implies that there shall appear on the record at least some color of right to a dismissal. That is not pretended in this case. We are therefore compelled to deny the motion.

Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this is a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this Court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

It may be argued—not by appellants, for, surely it does not now lie in their mouths—that this Court is without jurisdiction, either to affirm or award damages; but there is much force in the position that the proceedings were sufficient to delay appellee in the fruits of his judgment and bring him here at great expense. Appellants have certainly so far submitted themselves to the jurisdiction of this Court, as to be liable to amercement in costs and damages, if their proceedings are frivolous, taken for delay, or *mala fides.*

This Court has such jurisdiction over these appellants and their cause as enables it to rebuke or punish bad faith, and protect in some measure a party wrongfully brought here and delayed, by affirmance of the decree below, with the costs and damages contemplated by the Statutes (Rev. Statutes, Sections 1010 and 1012), and the rules of Court, even though the Court would decline jurisdiction "on the merits."

The motion for affirmance is therefore respectfully urged.

Appellee's motions are humbly submitted, with tender of apology for prolixity.

FRANK V. DRAKE,
Attorney for Appellee.

Additional suggestions on the appellant's affidavits
next page

THE AFFIDAVITS.

Since the preceding matter was in type and printed, appellant's affidavits arrived and their distinguished attorney has generously submitted a copy thereof for inspection.

Further argument thereon is submitted with hesitation.

If the matter now attempted to be established by these affidavits were true, why did defendant under his solemn oath deny the fact, and take the witness stand in person? Why did he frame issue thereon for the consideration and determination of the trial Court, and present witnesses for whose truthfulness he made voucher, to that Court, and thus seek (as they would now make it appear) to deceive the Court below, both as to the issues in this cause and the facts in the case?

Why were not these affiants called at the trial as witnesses?

It is not from apprehension that this Court will consider the affidavits for the purposes intended, that comment is here indulged, but to again insist that such proceedings should be stamped with deserved disapproval and visited with a merited penalty.

An affidavit of Constance A. Dakyns is presented. She was called as a witness by complainant at the trial. Her testimony there in chief (see appendix page 25) conforms to her statement in the affidavit, *but the cross-examination of the witness by the defense at the trial* (appendix page 26) *so far affected the value of her opinion or judgment that the Court below did not adopt her estimate.*

This circumstance illustrates the necessity for the rule that *ex parte* affidavits will not be read to attack either the findings or decrees of a Court when made upon full hearing.

Those findings and decrees are verity.

No rules of estopple are more firmly settled than those which

hold litigants to their pleadings and to facts established by their own witnesses.

TALKINGTON'S AFFIDAVIT: The complaint was filed *April* 20, 1886. Talkington's verified answer was filed *May* 14, 1886, wherein, as before repeated, he denied that the value of the estate in controversy "was on February 15, 1884, *or at any time since has been* of the value of $7,000, or of any greater value than $4,000" (appendix page 13).

His affidavit, now presented, runs: "In my opinion the interest in controversy at the commencement of this suit could not have been sold for more than $4,500. If there had been no litigation concerning this property it could have been sold *in April*, 1886, for $5,500, and it was worth and could have been sold in December, 1886, for $6,000."

Comment on this man and his methods will not be pressed. That he was capable of the frauds found against him by the Court at the trial is palpable.

In which instance is he truthful?

THE POINT WAS FULLY CONTESTED AND LITIGATED:

In addition to what has before been said I wish to repeat that issue was taken on the value of the land, in the pleadings. The defense was framed upon the theory that it was less than $5,000. Six witnesses and a lease were introduced to support that defense. Their attorneys at the trial cross-examined complainant's witnesses upon that theory (see the Exhibit page 26).

In their printed brief to the Court which tried the case they stated the disputed points in these terms (page 3 of their printed brief): "Disputed: I. The value of Winchester farm. II. Value of saloon, stock and fixtures and good will. III. Misrepresentation and falsification of books," and thereupon they review the testimony of the witnesses who testified to the value of the land (pages 3 and 4 of their brief)

concluding on page 4 in the following words: "From this testimony and considering the interest of the witnesses, we think it can fairly be said to be worth—the one-half—about $3,500, and this view is strengthened by the fact that complainant leased his half for ten years for $250 per year and lessee to pay taxes."

The arduous labors of the learned attorneys for the defense were so successful in that behalf that they convinced the Court and established the fact that the lands in controversy were worth but $5,000; that their client should be liable to account for no greater value, and further succeeded in reducing the claim against him in the sum of $812, to be paid him on a reconveyance.

The effect of the affidavits now offered is to attack the correctness of the findings of the eminent Judge who patiently heard and considered the cause at the trial. If he erred in judgment as to the weight of the evidence on the point, as is now sought to be shown, it was the result of direct and persistent efforts of defendants to accomplish that end.

If these affidavits state the truth, appellants merit punishment; they are trifling with the Courts, and are reckless of their doings.

The brief referred to will be exhibited to opposite Counsel and submitted herewith.

Very respectfully,

FRANK V. DRAKE,

Attorney for Appellee.

APPENDIX.

EXTRACTS FROM RECORD RELIED ON IN SUPPORT OF MOTION TO DISMISS APPEAL.

The Pleadings, Findings and Decree of the Circuit Court, and so much of the evidence in the record as was introduced at the trial touching the value of the premises in controversy.

[The titles of the Court and Cause and verifications are here omitted—all the pleadings were verified.]

THE BILL.

To the Hon. the Judges of the Circuit Court of the United States, for the District of Oregon, for the Ninth Circuit.

H. M. Dumbleton, a subject of the Kingdom of Great Britain and a citizen of Exmouth, England, brings this, his bill against F. P. Talkington, of the City of Salem, Oregon, and a citizen of the State of Oregon, and D. Marx, and E. C. Joergensen, severally residents in the City of Portland, Oregon, and citizens of the State of Oregon, and thereupon your orator, humbly complaining, showeth unto your Honors:

That from, to wit, the 15th day of February, A. D. 1884, to and until, to wit, the 23d day of February, A. D. 1885, your orator possessed and was seized in fee simple of an undivided moiety, viz: an undivided one-half interest and estate in and to certain lands, realty and appurtenances thereto belonging, situate, lying and being in the County of Douglass, and State of Oregon, bounded and particularly described as follows, to wit: The donation land claim of John Aiken and wife, being claim number fifty-one (51) in Sections thirty (30) and thirty-one (31), in Township twenty-six (26) South, Range five (5) West, and claim number fifty-three (53), in Sections twenty-five (25) and thirty-six (36), in Township twenty-six (26) South, Range six (6), West of Willamette Meridian, containing six hundred and forty-two and $\frac{76}{100}$ acres, also all that part of the donation land claim of Calvin C. Reed, being claim number forty-seven (47), notification number 3429, in Township twenty-six (26) South, Range five (5), West of Willamette Meridian, lying South of the North Umpqua River, containing three hundred and twenty-two (322) acres. Said land containing in the aggregate 962.76 acres, more or less, excepting two acres, more or less, heretofore deeded by J. S. Aiken and wife to W. S. Gilliam, also excepting that certain piece of land heretofore and now used by Constance A. Dakyns and Charles S. Dakyns, and upon which was and now is situated the dwelling house of said Constance A. Dakyns and Charles S. Dakyns.

That said moiety, and estate of your orator in and to said described lands and premises at all the times herein stated was and now is of great value, viz: of the value of Seven Thousand Dollars.

And your orator further showeth unto your Honors that defendant, F. P. Talkington, for a period of more than six months next immediately preceding said 23d day of February, A. D. 1885, had been and then was conducting as proprietor and owner a saloon and bar-room known as "Dickinson's Sample Rooms," in the City of Salem, Oregon, and engaged in the business of retailing liquors, beer, wines and the like, at said

place, and owned and possessed at said time and place certain saloon furniture, fixtures and stock in trade, used in and about his said business.

That your orator being minded to sell and dispose of his aforenamed moiety and estate, in and to the lands and premises hereinbefore described, did, on or about the 10th day of February, A. D. 1885, go to the City of Salem aforesaid, to seek and negotiate a sale of his said named interest and estate in and to said lands and premises, at a fair and reasonable price therefor, and procure a purchaser at the value thereof; that immediately subsequent to the arrival of your orator in said City of Salem, as aforesaid, he was made acquainted with and introduced to said defendant, Talkington, who immediately thereupon, and prior to, and on said 23d day of February, A. D. 1885, covinously combining and conspiring with divers other persons to your orator unknown and deceitfully contriving how to injure and over-reach your orator, and with intent and purpose to cheat, wrong and defraud him of his said property and estate in said lands, and with intent and purpose to procure of and from him a conveyance and deed thereof, without fair compensation or consideration therefor, did, at divers times between the 10th and 23d days of February, A. D. 1885, make and cause to be made by others divers statements, representations, declarations and assertions to your orator to the purport and effect that the aforesaid property and business so as aforesaid owned and conducted by defendant, Talkington, at and in said saloon was of great value, and productive of much profit; that the said business, property and stock in trade of defendant Talkington, aforenamed, was at said last-named time and on said last-named date of the value of over Seven thousand dollars; that the said business theretofore and then being conducted and carried on by said defendant Talkington, in and at said named saloon, had long been and then was prosperous and productive of large profit, and long had been and then was producing a net profit of large sums of money, to-wit: of three hundred dollars per month, and that the monthly receipts of

said busines long had been and then were as great as six hundred dollars per month; and said defendant Talkington at divers times then and there, in pursuance of his aforesaid purpose and intent, did exhibit to your orator a certain pretended book of accounts in apparent corroboration and ostensible proof of his said declarations, and declared, represented and pretended to your orator that said book of accounts was the book of accounts kept by him in his said business and contained true and accurate entries and statements of the amounts of the receipts and expenses in and about said business; and your orator avers that said pretended book of accounts as so exhibited to him did at said time appear to disclose and seemed to verify said statements so as aforesaid, by defendant, made at said time.

That your orator was not at the time of the transfers and conveyances hereinafter named experienced in the business of saloon keeping, or of retailing goods or articles sold at places of such kind, nor was he possessed of any knowledge or information of the real values of the furniture, fixtures or stock in trade so as aforesaid theretofore and then owned and possessed by said defendant, Talkington, but that your orator at said times believed all and every the statements, representations, declarations and assertions so as aforesaid to him made to be true, and continued so to believe until after the conveyance and deed hereinafter mentioned had been by your orator executed and delivered to said defendant Talkington.

And your orator further shows unto your Honors, that at divers times during the period of time last hereinbefore mentioned, viz: from February 10th A. D. 1885, to and including February 23d, A. D. 1885, said defendant Talkington, in furtherance of his aforesaid covinous and fraudulent intent, represented, asserted and declared to your orator that he (said Talkington) could and would procure to be made to your orator a lease for a long term of years of the building and premises then being occupied as a saloon as aforesaid, and at divers times during said last-named period of time, proposed and offered to pur-

chase of and from your orator his said moiety, interest and estate, in and to the lands, premises and appurtenances hereinbefore described, upon considerations, terms and conditions to the effect following, that is to say:

That said defendant, Talkington, would convey, assign and deliver to your orator his said named business and his said saloon furniture, fixtures and stock in trade hereinbefore mentioned, and should and would procure and execute to your orator a lease of the premises and saloon wherein said business was being conducted for a term of two years; and that in consideration thereof your orator should make a deed and conveyance of his said moiety, interest and estate in and to said named lands and appurtenances to said defendant Talkington, and should and would assume payment and agree to pay to defendants, D. Marx and E. C. Joergensen, the sum of five hundred dollars in satisfaction of a certain indebtedness theretofore, and then owing and due to them by said defendant Talkington.

And your orator avers that at all said aforementioned times said defendant Talkington expressed great friendship for your orator, and treated and entertained your orator with great apparent hospitality and generosity, and your orator at all said times confiding in said professions of friendship, and the truthfulness of said Talkington verily believed that all and several the aforesaid statements, representations, declarations and assertions so as aforesaid made to him were true, and that said exhibit of a pretended book of accounts contained true and accurate entries and statements of the receipts and expenses of said business of said defendant Talkington; and your orator upon faith of the truthfulness thereof was deceived, overreached, misled and induced to accept and agree to said named proposal and offer of defendant Talkington, and acting under his said faith and belief and fully believing that said defendant Talkington was dealing fairly with him and was not intending to take advantage of him, your orator was induced to make and execute, and on, to wit, February 23d, A. D. 1885, so acting and believing, and being so misled, overreached, deceived and

induced, did make, execute and deliver to said defendant Talkington a deed and conveyance of all, and singular, his estate and title in and to his said moiety, interest and estate of, in and to said aforenamed and described lands and appurtenances, and did assume and undertake to satisfy and pay to said defendants, D. Marx and E. C. Joergensen, said named indebtedness of said defendant Talkington, to them, viz, said named sum of five hundred dollars.

And your orator further shows to your Honors, that on said 23d day of February, A. D. 1885, said defendant Talkington did assign and deliver to your orator said named business and saloon, and the furniture and fixtures thereof, and the stock in trade therein consisting of small quantities of whiskey, beer, brandy, gin, wines and the like, but at said time and at all times thereafter neglected and refused to procure or execute to your orator a lease of the premises and saloon wherein said business had been and was then being conducted and carried on.

And your orator further avers and shows unto your Honors that all and every said aforenamed statements, representations, declarations and assertions so as aforesaid made and caused to be made by said defendant Talkington to your orator to the purport and effect that the said property and business so formerly owned and conducted by said Talkington at and in said saloon and business was of great value, and productive of much profit, and of the value of seven thousand dollars, and that said business had long been and then was prosperous and productive of large profits, and long had been and then was producing a net profit, and that the monthly receipts of said business had long been or had ever been as great as six hundred dollars per month were wholly false. And your orator avers that said business at said named time was of no value and wholly without profit or gain. That the said saloon furniture, fixtures and stock in trade did not at the time of said conveyance and transfer exceed in value the sum of one thousand dollars. That said pretended book of accounts did not contain true or accurate statements of the receipts thereto-

fore, and then being had in and from said business; that said pretended accounts had long been by said defendant Talkington falsely kept, and contained false and fictitious entries of pretended receipts of said business, and that said false and fictitious entries of receipts were so by him made with the intent and purpose of misleading, deceiving and defrauding expected purchasers of said saloon and business, and of misleading, deceiving, overreaching and defrauding your orator in and about said aforenamed transaction, sale and conveyance. That your orator had no knowledge, information or suspicion of said aforenamed covinous, deceitful, false and fraudulent practices, doings and declarations of said defendant until after said above-named sales, conveyances and transfers were completed and ended.

And your orator further showeth unto your Honors that in order to secure the said named defendants, D. Marx and E. C. Joergensen, payment of said named sum of five hundred dollars, your orator on said named 23d day of February, A. D. 1885, executed and delivered to them a chattel mortgage therefor on said above described furniture and saloon fixtures so as aforesaid on that day assigned and transferred by defendant Talkington to your orator, and that nothing has been paid thereon.

And your orator further avers that he is informed and believes, and thereupon charges the fact to be, that on or about the 26th day of February, A. D. 1885, said named defendant, Talkington, made, executed and delivered to defendants, D. Marx and E. C. Joergensen, a mortgage in and for the sum of about eight hundred and ninety dollars upon the moiety, interest and estate of, in and to the said named lands and appurtenances hereinbefore described, and so as aforesaid theretofore conveyed by your orator to defendant, Talkington. That said before-mentioned sum of five hundred dollars, so as aforesaid, theretofore due, and owing by said Talkington to said Marx and Joergensen, and which your orator had as aforesaid undertaken and agreed to pay, is included in and constitutes a part of said named sum of eight hundred and ninety dollars so named in

and covered by said last named mortgage of said Talkington to said Marx and Joergensen, and your orator is informed and believe and thereupon charges the fact to be that the whole thereof remains unpaid and that said mortgage is and now remains wholly unsatisfied and unpaid; that said sum so secured by said last named mortgage bears interest, but of the rate or amount thereof your orator is uninformed.

Your orator further showeth unto your Honors that immediately upon the execution and delivery of said abovenamed deed and conveyance, said Talkington entered into the possession of the interest and estate of the lands and appurtenances so conveyed and ever since has received and enjoyed the proceeds, rents and profits thereof, amounting as your orator is informed and believes to about the sum of four hundred dollars. And your orator further avers that since said entry of said Talkington into and upon said lands he has permitted and committed waste thereon to the great injury and damage thereof, to wit, in the sum of dollars.

And your orator further shows and avers that immediately upon the conclusion of the above detailed transaction between said Talkington and himself, on said February 23d, A. D. 1885, he entered into the possession of said saloon and property therein and of the conduct of the business thereof, and so continued to be and to do for the period of about two months. That during said period of two months last named your orator for the first time learned of the deceptions, misrepresentations, concealment, artifice, falsehoods and frauds which had as hereinbefore set forth been practiced upon him, and that said business long had been, and then was, unprofitable, and that he had been overreached, grossly defrauded and deceived, and that it was impossible in the conduct of said business for him to pay the said sum of five hundred dollars so agreed by him to be paid to said Marx and Joergensen. That on or about May 1st, 1885, said Marx and Joergensen insisted upon payment to them of said named sum of money and threatened to institute legal proceedings against your orator to foreclose said named chattel mort-

gage theretofore as aforesaid executed by him to them; that he was at all said last named period of time unable to make payment thereof.

And your orator avers that he is informed and believes and upon such information and belief charges the fact to be that immediately subsequent to said 23d day of February, A. D. 1885, and during the whole of said last named period of time, said defendant, Talkington, in furtherance of his said intent and purpose to injure, wrong and defraud your orator, and contriving how to strip and divest him of his property and substance, and confederating and conspiring with said aforenamed other persons, to your orator unknown, and by divers fraudulent means, dishonest acts and doings, and by artifice, cunning and deceit did procure and cause a large share and portion of the wines, liquors and stock in trade, so as aforesaid assigned and transferred by him to your orator, to be taken, wasted and lost, and did take and remove and procure to be removed and taken from your orator's possession, without his knowledge or consent, and deliver and cause the same to be delivered to persons, to your orator unknown, large amounts of said stock in trade upon false, fictitious and pretended sales thereof, and did waste and strip your orator of much of his substance, money, property and effects, to his great damage and injury, and until your orator being without money or merchantable property or means to continue said business, and being so as aforesaid pressed for money and threatened with legal proceedings was compelled to, and did, on or about said 1st day of May, A. D. 1885, discontinue said business and dispose of and sell the remnant and residue of said stock in trade and all of said saloon, furniture and fixtures for the best and utmost price he could get, viz: for the sum of fifty dollars, and the payment or agreement to pay, by the purchaser, of the debt and liability of your orator to defendants, Marx and Joergensen, amounting to about the sum of eight hundred and fifty dollars. That one, George Hoey, became and was the pretended purchaser at said last named sale, and that said Hoey negotiated and made said last named pur-

chase at the secret instance and request of and with money furnished by defendant Talkington, and that said Hoey immediately after procuring said transfer and possession from your orator made a bill of sale and delivered possession of all said property last described, without consideration, to defendant Talkington, who ever since and now is in possession of the whole thereof.

And so your orator avers and shows, that the only consideration received by him in and about said named transactions, and for the interest and estate in said lands and appurtenances so formerly by him held, enjoyed and possessed and hereinbefore described, was and is said last-named sum of fifty dollars; that the interest and estate in said lands and appurtenances hereinbefore described has in the meantime been productive of rents and profits of great value, the precise amount whereof is unknown to your orator; and that said lands and appurtenances have by said defendant Talkington, since said 23d day of February, A. D. 1885, been subject to strip, waste and injury to the great damage thereof, the precise amount of which is not known to your orator.

And your orator further showeth unto your Honors, that since said last-named transfer and delivery of property by him, and since the discovery by him of the wrong doings, misrepresentations, deceits and frauds so as aforesaid done and perpetrated upon him by said defendant Talkington, he hath by himself, his agents and attorneys, repeatedly demanded of and applied to said defendant Talkington and requested him to make and render unto your orator a full accounting and settlement of and concerning all and several the said matters, transactions, dealings, transfers and conveyances hereinbefore mentioned, and of the rents and profits of said lands and appurtenances by him received, and the waste and injury thereon by him committed and permitted, and that he pay over to your orator such moneys of rents and profits and for damages as he should be found liable to do; and that he make, execute and deliver to your orator a good and sufficient deed and convey-

ance of all the interest and estate in and to said lands and appurtenances heretofore as aforesaid conveyed by your orator to said Talkington, and that he satisfy, pay and discharge the incumbrance and mortgage so as aforesaid held and owned by defendants, Marx and Joergensen. And your orator avers that he at all times, at and from the first demand, application and request so as aforesaid made upon said defendant Talkington, has been and now is ready, willing, desirous and able to enter into, make and render a full, fair, mutual and complete accounting and settlement of all and several said named transactions, property and doings upon his part, and upon completion thereof to forthwith pay such sum of money, if any, as might or may from any just cause be ascertained or found to be due from him to said defendant Talkington.

And your orator well hoped that said defendant Talkington would have complied with such reasonable demands and requests as in justice and equity he ought to have done, but now so it is, may it please your Honors, he has at all times absolutely refused and still does absolutely refuse to make, execute or deliver to your orator a deed or other conveyance of said interest and estate in said named lands or any part thereof, or to satisfy or pay the whole, or any part of said named mortgage thereon, or to pay, render or make any accounting, settlement or statement as by your orator requested, or at all, or to comply with all, or any said requests or demands so as aforesaid heretofore made to and upon him by your orator, his agents and attorneys.

To the end, therefore, that justice may be had and done in the premises, your orator humbly prays that defendants be required to answer the premises; that an account may be taken under the direction of this Hon. Court, of what, if anything, is due to the said defendants, D. Marx and E. C. Joergensen, on the mortgage so as aforesaid executed and delivered to them by defendant Talkington, and if anything be found due thereon that defendant F. P. Talkington be decreed to pay and

satisfy the same, and defendants Marx and Joergensen be ordered and decreed to enter satisfaction thereof of record;

That a full, true and perfect account may be taken under the direction of the Court, between your orator and defendant F. P. Talkington, of and concerning all and every the rents and profits by him received of and from said described lands and premises since said February 23d, A. D. 1885; and of the injuries, waste and damage thereon committed and suffered by him since said last named date; and of and concerning all and singular, the doings and transactions between your orator and defendant F. P. Talkington, hereinbefore described, and if any residue or balance be found due to your orator, that said defendant Talkington be adjudged and decreed to pay the same; and if any residue be found due from your orator he is ready and willing to pay the same when ascertained; that said defendant F. P. Talkington be adjudged and decreed to execute and deliver unto your orator a good and sufficient deed, conveyance and title, free from any and all incumbrances, by him made or suffered, or made by any person claiming under him, of and to the aforesaid moiety and undivided interest and estate in and to said premises and land, with appurtenances, hereinbefore described, and that he may deliver over to your orator all title, deeds and writings in his possession relating thereto; and in case he neglects or refuses to execute and deliver said deed that a Master of this Honorable Court be authorized and decreed to make, execute and deliver to your orator such conveyance and deed, in manner and form to be approved by the Court, as and for the act and deed of said defendant F. P. Talkington.

And your orator prays such other and further relief in the premises as to your Honors shall seem meet and this case require.

May it please your Honors to grant unto your orator a most gracious writ of subpœna of the United States of America, to be directed to the said F. P. Talkington, and the said D. Marx and E. C. Joergensen, commanding them and every of them at a

day certain, and under certain pains therein to be specified, personally to be and appear before your Honors in this Hon. Court, and then and there to answer all and singular the premises and to stand to perform and abide by such order and decree therein as to your Honors shall seem agreeable to equity and good conscience.

And as in duty bound your orator shall ever pray.

GEO. L. WOODS,
FRANK V. DRAKE,
Solicitors for Complainant.

(*Verified*). (*Endorsed, Filed April* 20, 1886).

ANSWERS.

(*Title of Court and cause*).

Answer of F. P. Talkington, Defendant, to the Bill of Complaint of Henry M. Dumbleton, Complainant.

The defendant, F. P. Talkington, now, and at all times hereinafter, saving and reserving to himself all, and all manner of benefit and advantage of exception, which can, or may be had, or taken to the many errors, uncertainties, and other imperfections in said Bill of Complaint contained, and to the jurisdiction of said Court, for answer to the Bill, or unto so much thereof, or such portions thereof as this defendant is advised, is, or are, material or necessary for him to make answer unto, says:

That he admits that the Complainant was from February 15, 1884, *until February* 23, 1885, *the owner of the property described in the Bill of Complaint, but this defendant denies that said property, or Complainant's interest therein, was on February* 15, 1884, *or at any time since, has been of the value of* $7,000, *or of any greater value than* $4,000.

This defendant admits that for more than six months prior to February 23, 1885, he had been proprietor and owner of the business described in the Bill of Complaint, but denies that he was the owner of all the furniture and fixtures contained in the place known as "Dickinson's Sample Rooms," as therein alleged.

The defendant, further answering the Bill, admits that the complainant was inclined and intended to sell said real estate and premises, and that about February 10, 1885, he came to the City of Salem to seek and negotiate a sale of his said interest and estate in and to the lands described in the Complaint at a fair and reasonable price therefor, and to procure a purchaser at some price, but whether at the full value thereof this defendant is ignorant, and has no information on the subject. Defendant admits that immediately, or shortly after complainant's arrival at Salem, he became acquainted with this defendant, but defendant denies that immediately thereupon, or prior to February 23, 1885, or at any time, he covinously, or combining, or conspiring with any person or persons, or deceitfully, or otherwise contriving how to injure, or overreach complainant, or with intent, or purpose to cheat, or wrong, or defraud complainant of his said, or any property or estate in said or any lands, or with intent or purpose to procure of, or from him a conveyance or deed thereof, or of any part thereof without fair or any consideration therefor, *or did between the 10th and 23d day of February, 1885, or at any time, make, or cause to be made any statement or representation, or declaration, or assertion to complainant to the purport or effect that defendant's said property was of the value of* $7,000, or that said business was then, or had been producing a net profit of $300 per month, or that the monthly receipts were as great as $600 per month, or that defendant at any time, or place, in pursuance of said alleged or any purpose, or intent did exhibit to complainant any book of account in apparent corroboration, or ostensible proof of any declaration, or declared, or represented, or pretended to complainant that said book of accounts, was the book of accounts

kept by him in his said business, or contained any true or accurate entry, or statement of accounts of any receipt or expense, in or about said business, or that said book so alleged to have been exhibited to complainant, did appear to disclose or seemed to verify any statement made by this defendant. This defendant further denies that at the time of the transfer and conveyance referred to in said Bill, said complainant was inexperienced in his business of saloon keeping, or of retailing the goods or articles sold at places of such kinds, or that he was not possessed of any knowledge or information of the real value of the said furniture or fixtures or stock so owned by this defendant.

This defendant denies that complainant believed all, or any of the statements, or representations, or declarations, or assertions, so alleged in said Bill to have been made, to be true, or that he continued so, or at all, to believe until after the deed or conveyance described in the Bill had been made or delivered to the defendant, or that he believed any statement, or representation, or declaration, or assertion of the character alleged in said Bill, for this defendant denies that any such were ever made by this defendant.

Further answering, this defendant denies that at any time or place he, in furtherance of any covinous or fraudulent intent, represented, or asserted, or declared to complainant, that (he) could or would procure to be made to complainant a lease for any length of time whatever, of the building or premises so occupied for said saloon, and denies that at any time, whatever, he proposed or offered to purchase from complainant his said interest and estate in said lands or any portion thereof, upon any consideration, or terms, or conditions whatever, until after said complainant had offered and tried to sell the same, and importuned this defendant to purchase the same, or exchange his said saloon therefor.

Defendant further denies that he offered or proposed to purchase complainant's interest in said property, or that this defendant would convey, or assign, or deliver to complainant his said business, or saloon, or fixtures, or stock, or would procure

or execute a lease of the premises, or saloon, or fixtures or stock, or would procure or execute a lease of the premises, or saloon, wherein said business was conducted for two years, or any time whatever, or that in consideration thereof complainant should make a deed or conveyance of his said lands, or premises to this defendant, but admits that complainant agreed to, and did assume, the payment to Marx and Joergensen of said sum of $540; defendant admits that he always treated complainant hospitably and civilly, but denies that he expressed friendship for him, or that complainant confided in any profession of friendship, or that he believed all or any of the alleged, or any statements, or representations, or declarations, or assertions were true, or that the exhibit of said book of account, contained true or accurate entries, or statements of any receipt or expense of said, or any business, or that complainant, upon faith of the same, or any of them, was deceived, overreached, or misled, or induced to, accept, or agree, to said, or any proposal, or offer, of this defendant, or that acting under said faith or belief, or fully, or at all, believing that defendant was dealing fairly, and was not intending to take advantage of him, or that he was induced to make, or execute on February 23d, 1885, or at any time, or so acting or believing, or being so, or at all, misled, or overreached, or deceived, or induced, he made, or executed, or delivered, to defendant a deed of conveyance of said complainant's land and premises, or did so assume said indebtedness to Marx and Joergensen.

Further answering this defendant says, that on or about February 23d, 1885, he did assign and deliver said saloon, together with the stock in trade then on hand, but denies that he neglected or refused, or ever offered to procure, or execute a lease of said premises or saloon to complainant.

Defendant denies that all or any of the statements or representations, or declarations, or assertions ever made, or assumed to be made to complainant, or that said saloon was of great value, or that said business had then been, and then was prosperous and productive of large profits, were, or were any of

them false, and denies that said business at said time, or prior thereto, was of no value, or without profit or gain.

Defendant denies that said saloon, fixtures, furniture, or stock in trade did not, at the date of said transfer, exceed in value the sum of $1,000, or that said book of accounts, did not contain true, or accurate statement of receipts, or that said account had been falsely kept, or contained any false or fictitious entry or receipt of said business, or that they or any of them were so kept with intent or purpose of misleading, deceiving or defrauding any expected purchaser of said saloon, or business, or of misleading, or deceiving, or overreaching, or defrauding complainant or any one.

Defendant says, if complainant made, or executed or delivered on February 23d, 1885, or at any time a chattel mortgage to Marx and Joergensen on the property sold, and transferred to complainant by defendant, he has no knowledge thereof, or information thereof; but is willing to admit that complainant never paid anything hereon, if he did so execute and deliver said mortgage.

Defendant admits that, on February 26th, 1885, he executed and delivered to Marx and Joergensen the mortgage described in said Bill, but denies that said sum of $500 described in said Bill was included therein, or was a part of said sum of $890, and defendant admits that the same is not paid, nor is any part thereof paid.

This defendant admits that ever since the date of said deed of said real estate, to him, he has been in the possession thereof, but denies that the net rents, or profits, or profits of same amount, to the sum of $400, or to any sum whatever, greater than 183\frac{95}{100}$; but defendant denies that he has committed or permitted any waste of said property.

Defendant admits that on February 23d, 1885, complainant entered into possession of said saloon and business, but denies that subsequent thereto, or at any time, he first or at all, learned of any deception, or misrepresentation, or concealment, or artifice, or falsehood, or fraud of this defendant, or that said

business had been, or was unprofitable, or that he had been overreached, or grossly, or otherwise defrauded, or deceived, or that it was impossible in the conduct of said business, for him to pay Marx and Joergensen, the sum he so promised to pay them.

Defendant says he has no knowledge, or information as to whether on March 1st, 1885, or at any time said Marx, and Joergensen insisted upon payment of said sum of money, or threatened to foreclose said chattel mortgage, or whether complainant was able to pay the same.

Further answering, this defendant denies that at any time in furtherance of any intent, or purpose to injure or wrong, or defraud complainant, or contriving how to strip, or divest him of his property, or substance, or confederating, or conspiring with any person or persons, or by fraudulent or other means, or acts, or doings, or artifice, or cunning, or deceit, did procure, or cause a large, or any share, or portion, of the wine, or liquor, or stock in trade theretofore, assigned, or transferred to complainant, to be taken, or wasted, or lost, or did take or remove, or to procure to be removed, or taken from complainant's premises, with his knowledge, or consent, or deliver, or cause the same to be delivered to any person or persons, large, or any amount of said or any stock in trade, upon false, or fictitious, or pretended sales, or otherwise, or did waste, or strip complainant of any of his substance, or money, or property, or effects, or until he was without money or means to continue said business.

This defendant admits the sale of said saloon and fixtures to George Hoey, as alleged in the bill, and upon the terms therein avered, and subsequently transferred the same to this defendant, and this defendant admits that said Hoey was the agent of defendant in negotiating said sale.

The defendant denies that the only consideration received by complainant for his said interest, in said lands, was said sum of $50, or that said lands described in said Bill has been productive of *rent or profit of great net value, or any value greater*

than $183\frac{95}{100}$, or that said lands at any time since said conveyance, has been subject to waste, or injury of any kind or amount whatever.

Defendant admits that complainant and his solicitors have requested a settlement of affairs, and have demanded a conveyance of said lands from defendant to complainant, and, also, that defendant satisfy the said mortgage of Marx and Joergensen, which the defendant has declined to do. And this defendant says he does not know, and is not informed whether complainant is willing, or desirous, or able to abide the decree of this Court, if decree should be made against him, and admits that he has declined to make, or render any account to complainant.

This defendant, further answering the complainant, avers ;

That on, and prior to February 23d, 1885, the complainant was the owner of the lands described in the Bill of Complaint, and this defendant was the owner of the saloon, and its stock in trade, which is mentioned in the Bill, but was not, and did not pretend to be the owner of the saloon furniture which was and had been the property of Marx and Joergensen since August 17th, 1882.

Defendant further avers that complainant is, and for a considerable time prior to February 23d, 1885, had been improvident and shiftless and practically and constitutionally opposed to labor, and while traveling about the State in the endeavor to dispose of his said lands, lodged at Salem, Oregon, and immediately exerted himself to put said lands upon the market to be disposed of, and among many others with whom he became acquainted, was the defendant. Defendant further avers that he was a constant visitor at his said saloon, and was persistent in his attempt to effect an exchange of his said lands, for defendant's said saloon and stock, and represented to defendant that his said lands were of the value of $7,000, and that he was not accustomed to farming, and wanted to engage in the saloon business, and offered to convey said land to defendant, and would assume and pay to Marx and Joergensen $540, then

owing them by said defendant Talkington, in exchange for said defendant's said saloon, and its good-will and stock in trade.

Defendant further avers that said exchange was on or about February 26th, 1885, made upon the terms and conditions so as aforesaid proposed and offered by said complainant, who, at at once entered into possession of said saloon, and the conduct thereof; that at said date said saloon was in a prosperous condition, and then, and for a long time prior thereto, had, by constant attention to its business, yielded a net profit of at least $200 per month, *and there was on hand at the said date a stock in trade of the value of nearly* $3,000, all of which was, by said agreement, sold and transferred to complainant.

Defendant further avers that immediately after entering into possession of said saloon, and stock in trade, complainant neglected his said business, and by debauchery and profligate and dissolute habits, squandered and sold, and disposed of said goods, and spent the proceeds thereof so rapidly, and to such an extent, that on April 4th, 1885, he had ruined said business, and was destitute of means or credit, and being unable to restrain his said habits, and being desirous of getting money, he put said saloon and business upon the market, and offered the same for sale at any price he could obtain therefor.

Defendant further avers that said complainant, openly, and publicly offered said saloon and stock to any person who would pay him $50 in cash, and would assume the payment to Marx and Joergensen of $850, then owing by said complainant to them, and would also assume $35 rent then due upon said saloon, together with $10 due James Graham and $60 due this defendant.

Defendant further avers that as soon as he became acquainted with the fact that complainant contemplated said sale, and had made said offer, he authorized one George Hoey, to purchase the same for defendant, which said Hoey did on May 4, 1885, and thereafter immediately transferred the same to this defendant. That at the time of said transfer to said Hoey, the stock on hand in said saloon did not exceed the sum of $50 in value,

and the business reputation and good will of said busines was practically ruined.

Defendant further avers that at the time of said transfer of said saloon from the said defendant to said complainant, the said saloon, stock in trade, and the good will thereof was of the value of at least $4,000.

Defendant further answering, avers that it appears upon the face of said Bill of Complaint, and by the allegations therein contained, that the facts therein stated are not sufficient to constitute a cause of suit by the said complainant against his or any of the herein-named defendants, and that there is no equity in said complainant's Bill of Complaint. Answering further the defendant denies all and all manner of unlawful combination, and confederacy, where-with he is by said Bill charged; without this that there is any other cause, or matter in the said Bill contained material, or necessary for this defendant to make answer unto, and not herein, and hereby well, and sufficiently answered, confessed, traversed and avoided, or denied is true to the knowledge or belief of this defendant; and which matter and things, this defendant is ready to aver, and maintain, and prove, as this Honorable Court shall direct.

This defendant, therefore, hereby asks a decree of this Honorable Court that it be decreed that the complainant's Bill be dismissed with the costs and charges, by this defendant most wrongfully sustained.

GEO. W. YOCUM,
W. SCOTT BEEBE,
Defendant's Solicitors.

(*Verification*). (*Endorsed, Filed May* 14, 1886).

Answer of E. C. JOERGENSEN and D. MARX, defendants, to the Bill of Complaint of Henry M. Dumbleton, Complainant.

These defendants, E. C. Joergensen and D. Marx, now and at all times hereafter saving and reserving to themselves all

and all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said Bill of Complaint contained, and to the jurisdiction of said Court, for answer to the Bill, or unto so much thereof, or such portion thereof as this defendant is advised, is, or are mentioned or necessary for them to make unto, says :

That they, nor either of them have any knowledge or information of the fraud or conspiracy alleged or contained in said Bill of Complaint, and therein avered against defendant Talkington, except as to the matter hereinafter particularly answered unto, and as to those matters, these defendants deny :

That complainant on February 23d, 1885, or at any day, executed or delivered to them, or either of them, any chattel mortgage on the property described in said Bill, or on any part of it.

These defendants admit that on February 26th, 1885, the defendant Talkington executed and delivered to these defendants a mortgage for the sum of $890 upon the real property described in said Bill ; but they deny that said sum of $500 mentioned in said Bill, is included in, or constitutes a part of said sum of $890 covered by said Mortgage ; and these defendants admit that the whole of said $890 together with the interest thereon at the rate of ten per cent. per annum remains unpaid and wholly unsatisfied.

Further answering, these defendants deny that on May 1st, 1885, or at any time, they insisted upon payment to them of said sum of money, or threatened to institute legal proceedings against the complainant to foreclose said or any chattel mortgage ; and they deny that the complainant ever executed any chattel mortgage to them of any kind or nature whatever.

Further answering, these defendants aver that ever since August 17, 1882, they have been the owners of the safe, counter and fixtures in the saloon mentioned in the Bill of Complaint, and known as "Dickinson's Sample Rooms." That defendants were in the possession of the same under an agree-

ment to purchase the same; and on February 23, 1885, the value thereof had been (paid) except the sum of $540, and that on said day defendant Talkington was indebted to and owing these defendants the sum of $1,430, which said amount included said sum of $540.

That the complainant and said Talkington on said day agreed to an exchange and sale of said property described in the Bill, and it was then and there agreed that said complainant would assume and pay to the defendants said sum of $540, together with the sum of $310, the value of goods then and there sold and delivered to complainant, on or before 90 days therefrom, and these defendants, in consideration thereof, agreed that if said complainant should pay said sum of $850 on or before said date, then, that they would sell and convey the title to said safe, connter and fixtures to said complainant.

Further answering, these defendants allege that in order to secure them in the payment of the balance of said sum of $1,430, said Talkington then and there made, executed and delivered to them the note and mortgage described in said Bill, and thereby undertook and promised to pay them the sum of $890 one year from date, and that said sum should bear interest at the rate of ten per cent. per annnm, and that no part of said sum of $850, or said sum of $890 has been paid, but is now due and owing.

These defendants further answering, deny all, and all manner of unlawful combination and confederacy, wherewith they are by said Bill charged, without this, that there is any other cause or matter in the said Bill contained, material or necessary for these defendants to make answer unto and not herein, and hereby well or sufficiently answered, confessed, traversed and avoided, or denied, is true to the knowledge or belief of these defendants when they have such knowledge or belief. All of which matters and things these defendants are ready to aver, maintain and prove as this Honorable Court shall direct.

These defendants thereupon pray of this Court a decree fore-

closing said mortgage, and an order of sale of said property therein described, and the proceeds applied to the satisfaction of the amount found due thereon, and that these defendants recover their costs by them sustained.

GEO. W. YOCUM, W. SCOTT BEBEE,
Defendant's Solicitors.

(*Verification.*)

To the answers replications were duly filed.

Pending the taking of testimony the following stipulation was filed:

(*Title of Court and cause.*)

It is hereby stipulated and agreed that plaintiff amend his Bill of Complaint as presented and filed herein this day; that said amendment be taken and held as specifically denied by defendants, severally, and replication thereunto made.

(*Signed by respective attorneys and endorsed filed Aug.* 6, 1886.)

Whereupon, by leave of Court, was filed an amendment to Complainant's Bill as follows:

(*Title of Court and cause.*)

Comes now complainant in above entitled cause; and by consent of parties thereto, and by leave of Court first had and obtained, and amends his Bill of Complaint herein filed, and makes averment, and after the paragraph ending with the word "uninformed" in the 10th line of the 8th page of said Bill of Complaint, further alleges and shows as follows:

"Your orator further showeth unto your Honors that he is informed and believes, and thereupon charges the fact to be, that prior to and at and during the time of the transactions so as aforesaid had and made between complainant and defendant Talkington on said 23d day of February, 1885, and until, and at the time of the execution of said mortgage upon the land

and premises herein described by defendant Talkington to defendants D. Marx and E. C. Joergensen, on said 26th day of February, 1885, said D. Marx and E. C. Joergensen, had notice and knowledge of the covinous, deceitful and fraudulent acts and purposes of defendant Talkington hereinbefore set forth, and did assent thereto, and acquiesce and participate therein, and at all said times did abet and conspire with said defendant Talkington in the accomplishment of said fraudulent acts and purposes, and did accept and share in the advantages and fruits thereof.

(*Verification.*) (*Endorsed, Filed Aug.* 6, 1886.)

THE TESTIMONY.

Following is the testimony taken at the trial as to value of the property in controversy:

H. M. DUMBLETON (complainant). * * I know defendant Talkington; made his acquaintance in Salem, Oregon, somewhere in the spring of 1885. My interest in the lands described in the Bill of Complaint, at the time I became acquainted with Talkington was worth $7,000 (p. 75 of the record). * * * In this conversation I had told him that my lands were worth $7,000; that's what I had paid for them, and considered them worth (p. 76 of record). * *

CONSTANCE AGNES DAKYNS: * * I am acquainted with the lands in controversy. I owned the undivided half of said lands; have lived there seven years. I know the character and value of said lands. The whole tract, including my interest, I value at $15,000. It was of the same value in February, 1885. * * (p. 103 of record).

(*On Cross-examination*). * * Don't know what it is assessed at this year, I think at $5,000, the same as years ago; the same as when Mr. Aiken refused $35,000, and when we paid $10,000. Of course I want to keep up the value. * * * I once offered to purchase of Mr. Talkington. He wanted $4,500, and I refused to take it because I considered his title wasn't good; then I offered him $2,000 and never heard from him since. * * (p. 105 of record).

SOL. ABRAHAM: * * Have lived in Douglass County about 33 years; am well acquainted with the general character of the lands of that County. I know the lands, or farm in that County known as "Winchester." Have known it pretty much ever since I have been in Douglass County. I should judge that tract of land to be worth $14 or $15 per acre * * (p. 106 of record).

(*On Cross-examination*). * * My estimate of the value of the lands is based on the actual value of lands without regard to the water power. If I had to farm it, I'd rather have $15,000 than the farm. I couldn't make a living farming myself. I know where Mrs. Dakyns lives. If you take her house and the 3 acres surrounding it out of the farm, it would lessen its value about $1,000 to $1,200 (p. 107 of record).

TESTIMONY FOR THE DEFENSE.

JOHN AIKEN: * * * Age 68 years. * Know the Winchester farm; it was my old Donation Claim. Am well acquainted with the property; lived there till the last four years; went there in Spring of 1850, and staid there till four years ago last Fall; gave that place to my son Jo. Aiken, and he sold it with sheep, stock, implements and his half of the ferry for $11,000, I think it was, won't say positively. The farm without stock or implements, I think is not

worth more than $6,000. * * * I had contracted to trade for Dumbleton's interest in that farm before he went into the saloon, and the deed was made out * * * the consideration or value of the land I was to trade him for his interest in that farm was $3,000 (p. 146 of record).

JOSEPH AIKEN: * * * I sold the Winchester farm to Mrs. Dakyns, I think the deed was in her name, for, I believe, $11,000. It was seven or eight years ago. I sold the farm, implements, and some stock on the place for the $11,000. The sale included the three acres on which Mrs. Dakyn's house stands. I was born on the place, lived there since '53, until I sold out, except about 3 years:

Question: (by defense) "What, in your judgment, was the undivided one-half of that property worth in February, 1885, leaving out the three acres on which Mrs. Dakyn's house stands?"

Answer: "About $3,000 I should judge," (p. 148, 149 of record.) * * * when I sold the Douglas County farm it was worth more than when Dumbleton sold it; they have not put any new fences on it; tore down one house; rushes have grown up on it; farm run down, (p. 152 of record).

H. C. SLOCUM: * * live at Roseburg, Oregon, * * have lived there about 32 years. Know the Winchester farm * * know the country there generally. Leaving out the three acres with the house, I shall suppose that farm was worth $6.00 or $7.00 an acre, * * (p. 157).

(*On Cross-examination*) * * * Have heard no one to-day make any expression as to the value of the land, but Mr. Talkington said he had offered the land for $3,600. Understood him to mean his half interest, * * (p. 158).

D. VAN HORN: * * I am acquainted with the Winchester farm, in controversy. I once leased it * * * was in possession of the farm nearly a year * * * and have my idea of the value of farms there. Leaving out the three acres on which Mrs. Dakyn's house stands, I should say there 300 acres of it, worth from $12.00 or $15.00 an acre, and the balance of it, $5.00 an acre would be a good price for it * * * (p. 163, 164 of record).

A. F. CAMPBELL: * * lived in Roseburg, Oregon, about 9 years * * was also engaged in the real estate business to some extent, * was * * acquainted with the value of farming lands in that County. I am acquainted with the Winchester ranch here in controversy * * omitting Mrs. Dakyn's house and three acres, I should judge there (are) about 250 acres of that ranch * * * * * which is worth $15.00 an acre; the balance * * goes in Douglas County at $5.00 per acre (p. 165).

F. P. TALKINGTON, (*defendant*), * * I first became acquainted with Mr. Dumbleton at Salem in January, 1885, I think, * * (p. 173) * * * he told me he would like to get into a business of some kind; that he had a farm in Southern Oregon * * * I asked him what his farm was worth. He told me that he had paid $7,500 for it; that he paid probably more than the farm was worth, and that he would like to dispose of this property in some way, either for money or a paying business * * * I went out and looked at this farm. *I came back and told him that it would be impossible for him to get more than* $3,500 *for the farm, that it wasn't worth more than that. Well, he kind of agreed to the matter himself,* that he couldn't get more than that. I told him that if we made a trade he would have to give me $500 to boot, (p. 175).

H. M. DUMBLETON, (complainant) Mr. Talkington came to see me shortly before this suit was begun at the Esmond Hotel. My brother * * and Ex. Gov. Woods * * were present, * * * I wanted a settlement with him * * * Mr. Talkington told me he would not give me back the ranch unless I paid him $3,600, (p. 212 of record).

LEASE.

Defendant introduced a lease from H. M. Dumbleton to one H. L. Murton, dated October 13, 1884, of undivided half of premises in controversy, for term of years at annual rent of $250 and taxes thereon.

(See Exhibit pp. 239 to 243 of record.)

THE DECREE.

In the Circuit Court of the United States for the District of Oregon.

HENRY M. DUMBLETON,
vs.
F. P. TALKINGTON, E. C. JOERGENSEN AND D. MARX.
No. 1,232.

November 8, 1886.

This cause came on to be heard on August 9, 1886, on the Bill and the answer of the defendant F. P. Talkington, and the joint answer of the defendants D. Marx and E. C. Joergensen, and the replication thereto, and the evidence taken before the examiner, and was argued by Mr. Frank V. Drake, of counsel

for plaintiff, and Mr. W. Scott Bebee, and Mr. Geo. W. Yocum, of counsel for the defendants, and taken under advisement by the court, and now at this day, due deliberation being had in the premises, the court does find and adjudge:

1. That at and before the filing of the Bill herein the plaintiff was an alien, to wit: a British subject, and the defendants were citizens of the State of Oregon.

2. That on and before February 23, 1885, the plaintiff was the owner in fee of the undivided one-half of the tract of land described in the Bill herein, to wit: The donation land claim of John Aiken and wife, being claim No. 51, in sections 30 and 31, in township 26 south, range 5 west; and claim numbered 53, in sections 25 and 36, in township 26 south, range 6 west of the Wallamet meridian, containing 642 76-100 acres; also that part of the donation land claim of Calvin C. Reed, being claim numbered 47, notification number 3429, in township 26 south, range 5 west of the Wallamet meridian, lying south of the North Umpqua river, containing 322 acres; said land containing in the aggragate 962 76-100 acres, more or less, excepting two acres, more or less, heretofore deeded by J. S. Aiken and wife to W. F. Gillam; also excepting that certain piece of land heretofore and now used by Constance A. Dakyns and Charles S. Dakyns and upon which was and now is situated the dwelling house of said Constance A. Dakyns and Charles S. Dakyns; all of said lands lying and being in the county of Douglas and State of Oregon, and that said half of said land was and still is of the value of $5,000 and no more; and that on said last mentioned date and for nearly two years prior thereto the defendant F. P. Talkington was engaged in the business of a retail liquor dealer in a saloon in Salem, Oregon, known as the "Dickinson Sample Rooms."

3. That on or about February 10, 1885, the plaintiff came to Salem with the purpose of disposing of said land, where he met Joseph Aiken, the former owner of the same, who introduced him to the defendant, Talkington, and by means of the false and fraudulent representations hereinafter stated, he was

induced to agree to exchange his interest in said land for said defendant Talkington's interest in said saloon, to wit: the stock on hand and the furniture and fixtures, and to pay said defendant Talkington $500 in addition thereto.

4. That during the negotiations for said exchange, and shortly before it was consummated said defendant Talkington represented to the plaintiff that the business of the saloon was large and very profitable, that the stock on hand was worth at least $2,000 and the furniture and fixtures were worth $1,500, while in truth and fact said stock was not worth over $800 and said furniture and fixtures not over $700.

5. That said defendant Talkington during the period of said negotiations procured a barkeeper then in his employ to alter and raise the entry of the receipts of the saloon for a large portion of the eleven months prior thereto, which were kept in pencil in a book in his possession, by putting a figure in the tens place when the original entry was confined to the units column, and by changing a one in the former column to a four, or rubbing out such one and writing a larger figure in its place so as to make it appear that such receipts were double or more, as large as they really were, and caused said book of receipts so altered to be shown by said barkeeper to the plaintiff as a true statement and account of the receipts covering said period.

6. That the plaintiff was altogether ignorant of the saloon business and placed confidence in the statements and representations of said defendant Talkington as to the value of the stock and furniture and fixtures in said saloon, and the amount and character of the business done therein, including the altered and false statement of the receipts thereof shown him as aforesaid, and was thereby deceived and induced to agree to exchange his interest in said land for said saloon.

7. That on February 23, 1885, in pursuance of, and on the faith of said false and fradulent representations at the store of the defendants Marx and Joergensen, in Portland, Oregon, the plaintiff conveyed his interest in said land to said defendant Talkington in exchange for said saloon, and agreed to pay to

said last-named defendants for said defendant Talkington the sum of $500, due from the latter to the former, and the sum of $40 due from the plaintiff to the defendant Talkington, and at the same time purchased from said defendants Marx and Joergensen $310 worth of liquors for the use of the saloon at Salem, for which sums, amounting to $850, the plaintiff then and there took from the last-named defendants a writing, endorsed on a bill of sale of the furniture and fixtures in said saloon, given by a former owner thereof to the defendants Marx and Joergensen, wherein they asserted their ownership of said property, and agreed that if the said amount of $850 was paid to them within ninety days, they would make a bill of sale of the property to the plaintiff.

8. That three days thereafter defendant Talkington executed and delivered to said Marx and Joergensen a deed, whereby he mortgaged his interest in said lands so conveyed to him by the plaintiff, to secure the payment of $690, which he still owed them on account, and $200 to be thereafter loaned him in cash, which deed was received by said defendants Marx and Joergensen, with knowledge of the nature and character of the transaction, as above stated, between said defendant Talkington and the plaintiff.

9. That thereupon the plaintiff went into possession of the saloon and commenced to carry on the same, but soon found that the amount and value of the stock on hand was much less than said defendant Talkington had represented them to be, and that the business and profits of the saloon had been greatly exaggerated by said defendant Talkington, and that what there was of receipts and profits therefrom had been largely derived from gambling carried on in the rear room of the premises, which the plaintiff at once discontinued as unlawful and criminal, and demanded of defendant Talkington a reconveyance to him of his interest in said lands, on which he would pay the former for whatever of the stock he had disposed of, which demand the former refused.

10. That the business in the hands of the plaintiff soon

proved unprofitable, and the defendants Marx and Joergensen threatened to close up the house if their claim was not paid at maturity, while the defendant Talkington, contrary to the terms of the exchange, refused to assign to the plaintiff the lease of the premises which he held. The plaintiff had no means wherewith to pay said defendants Marx and Joergensen, and became intemperate. In this state of things the defendant Talkington, who remained about the premises, and from the first had foreseen that the plaintiff would be unable to keep the saloon, advised him to dispose of it, and at the same time, on May 8, 1886, privately procured a friend to purchase it on the payment of $50 cash to the plaintiff and the assumption of certain indebtedness of the plaintiff, including the sum which the latter owed said defendants Marx and Joergensen on his own account, amounting in all to $456.60, and the debt due originally from the defendant Talkington to the defendants Marx and Joergensen, which had been assumed by the plaintiff, amounting then with interest to $548,40, who immediately turned the saloon over to defendant Talkington and Joe Aiken, who with the assent of the defendants Marx and Joergensen assumed the indebtedness due the latter, and commenced to keep the saloon in partnership and are still doing so, and with the aid of the gambling allowed and carried on there, are and have been doing quite as good business as defendant Talkington was doing at the time of the exchange with plaintiff.

11. That soon after the re-sale of the saloon to defendant Talkington the plaintiff removed to Roseburg, where without means, he managed to live by hunting, until early in 1886, when he first learned that the entries of the receips of the saloon shown him at the time of the exchange had been altered and raised as aforesaid, from one Heffner, a former secret partner of the defendant Talkington's in said saloon, whereupon the plaintiff promptly demanded of the defendant Talkington a recission of the contract, and a settlement of the accounts between them, coupled with an offer to pay the defendant Talkington any sum that might be found due him on a reconveyanee

of the plaintiff's interest in the land to him, which said defendant Talkington refused to do.

12. That the value of the stock in the saloon on February 23, 1885 was $800, and interest on that sum for one year and eight months makes $906 due the defendant Talkington, to which add the amount he paid the plaintiff and assumed for him on May 18, 1885, on the resale of the saloon, to wit: $456, making $1,362, from which deduct for stock on hand on May 8, 1885, $250, with interest for one year and six months, making $280, and for rent of land received by the defendant Talkington in October, 1885, $250, with interest thereon for one year, making $270, in all the sum of $550, which leaves due the defendant Talkington on account of the transaction $812.

Therefore it is adjudged and decreed that said defendant, Talkington, be taken and deemed to hold the legal title to the undivided half of the tract of land aforesaid and heretofore conveyed to him by the plaintiff in trust for the plaintiff, and that on the payment into court by the plaintiff within thirty days of the sum of $812, he reconvey the same to plaintiff by deed, to be approved by the master of this court, with proper covenants of warranty against his own acts; and it is further adjudged and decreed that the defendants Marx and Joergensen so far as said mortgage is concerned be deemed and taken to be purchasers with notice of the plaintiff's equity and only for the consideration of two hundred dollars thereupon advanced to the defendant Talkington, and that on payment to them by the clerk of said two hundred dollars with one year and eight months interest thereon, to wit: two hundred and twenty-one dollars and sixty-six and two-thirds cents, out of said eight hundred and twelve dollars, when paid into court, said Marx and Joergensen do duly release and satisfy said mortgage on the record; and it is further adjudged and decreed that in case said defendant Talkington and the defendants Marx and Joergensen, or either of them, fail or refuse to make the conveyance or release herein provided for within ten days

from the payment of said eight hundred and twelve dollars into court, the plaintiff may apply to Mr. George H. Durham, a master of this court, to make and deliver such conveyance and release, or either of them, as the case may be, in the name of and for said defendant Talkington and the said defendants Marx and Joergensen; and such master is hereby specially authorized and empowered to execute and deliver such conveyance and release, or either of them, in case of such failure or refusal; and it is further adjudged and decreed that the plaintiff recover of the defendants his costs and disbursements in this behalf sustained and expended, taxed at $319.50; and that the clerk, on the request of the plaintiff, pay said costs, including the cost of such conveyance and release, and disbursements out of said $812, and pay the remainder, if any, to the defendant Talkington.

DEADY, J.

(*Endorsed, Filed Nov.* 8, 1886.

R. H. LAMSON,
Clerk.)

STIPULATION FOR SUBMISSION OF MOTION.

This motion is submitted under stipulation in following words (omitting title of Court and cause):

It is hereby stipulated and agreed between the parties to this suit through their respective attorneys, undersigned, as follows:

The appellee is at liberty to file his motion to dismiss appeal at any time. The appellant to have until December 10th

to file affidavits as to value of property in controversy, subject to appellee's objection as to their admissibility. The said motion to be submitted on printed briefs of above parties to be filed not later than December 15th. Appellant waives service of copy of motion.

FRANK V. DRAKE,
Attorney for Appellee.

JOHN H. MITCHELL,
Attorney for Appellant.

PORTLAND, OREGON, *October 7th*, 1887.

(*Endorsed, Filed* 1887.)

123-445

IN THE

Supreme Court of the United States.

OCTOBER TERM 1887.

F. P. TALKINGTON, D. MARX and E. C. JORGENSEN,
Appellants,

vs.

HENRY M. DUMBLETON, Appellee.

Brief of Appellants in opposition to Motion of Appellee to Dismiss Appeal for want of Jurisdiction, and for Affirmance of Decree.

JOHN H. MITCHELL,
Attorney for Appellants.

Press of Thomas McGill & Co., Washington, D. C.

IN THE

Supreme Court of the United States.

October Term 1887.

F. P. TALKINGTON, D. MARX, AND E. C. JORGENSEN, APPELLANTS,

vs.

HENRY M. DUMBLETON.

Brief of Appellants in Opposition to Motion of Appellee to dismiss Appeal for want of Jurisdiction.

It is respectfully submitted the motion to dismiss should not prevail.

The motion is based, as it will be observed, upon the sole ground that the value of the matter in dispute in this Court is insufficient to confer jurisdiction.

Facts in the Case.

This suit was commenced by the appellee Dumbleton in the Court below, April 20th, 1886, for the purpose of recovering from the appellant, Talkington, the undivided one-half of a certain tract of land in Douglas County, Oregon, a conveyance of which, it is alleged in the complaint, was fraudulently obtained from him by the appellant, Talkington, February 23d, 1885. The complainant alleges the value of the land in controversy to have been, at the date of filing the complaint, $7,000.

The defendant Talkington, in his answer, averred the value of the land in controversy to be $4,000 at the date of filing answer, which was May 14th, 1886.

The Court below, in deciding the case in favor of the plaintiff, on the 8th day of November, A. D. 1886, found, among other things, the value of the land in controversy to be $5,000, *and no more*, the language of the Court below being as follows: "That said half of said land," that being the land in controversy, "was, and still is, of the value of $5,000, *and no more.*"

The testimony taken in the Court below, upon the question as to the value of the land, was conflicting, and ranged from $4,000 to $7,500.

Permission of this Court is prayed by the appellant to file affidavits in this Court upon the question of the value of the land in controversy at date of decree in the lower Court.

The counsel for appellee consents, furthermore, to the filing of such affidavits by a stipulation, of which the following is a copy, omitting title of Court and cause:

"It is hereby stipulated and agreed between the parties to this suit through their respective attorneys undersigned, as follows:

The appellee is at liberty to file his motion to dismiss appeal at any time. The appellant to have until December 10th to file affidavits as to value of property in controversy, subject to appellee's objection as to their admissibility. The said motion to be submitted on printed briefs of above parties to be filed not later than December 15th. Appellant waives service of copy of motion.

FRANK V. DRAKE,
Attorney for Appellee.

Portland, Oregon,
October 7th, 1887.

JOHN H. MITCHELL,
Attorney for Appellants."

The affidavits, together with the motion for leave to file them, are herein incorporated in full for the convenience of the Court, and speak for themselves.

Motion for leave to file Affidavits as to value of Land in controversy, with accompanying Affidavits.

"*In the Supreme Court of the United States.*
OCTOBER TERM, 1887.

F. P. Talkington, D. Marx, and E. C. Jorgensen, Appellants,
vs.
Henry M. Dumbleton, Appellee.

Now come the appellants, by their counsel, and move the Court for leave to file herein, in answer to the motion of appellee heretofore filed to dismiss this appeal for the reason that the value of the land in controversy is not enough to confer jurisdiction, certain original affidavits as to value of such land, which originals are now here presented, and copies of which are herewith submitted in printed form, for the convenience of the Court; counsel prays these affidavits may be filed at this time, in pursuance of a stipulation of counsel heretofore filed, and that the question as to their admissibility be reserved and considered on hearing of motion to dismiss appeal, as per said stipulation.

JOHN H. MITCHELL,
Atty. for Appellants.

AFFIDAVIT OF T. R. SHERIDAN.

In the Supreme Court of the United States.

Henry M. Dumbleton,
Complainant and Appellee,
vs.
F. P. Talkington, E. C. Jorgensen, and Daniel Marx,
Defendants and Appellants.

UNITED STATES OF AMERICA, *District of Oregon.* } *ss:*

I, T. R. SHERIDAN, being duly sworn, say that I have been for more than ten years a resident of Douglas County, Oregon, and am now county clerk of said county.

That I am acquainted with the farm and land known as Winchester, which is in controversy in the above-entitled suit.

That during the last two years said Winchester farm has been worth about $14,000, and is advancing in value.

T. R. SHERIDAN.

Subscribed and sworn to before me this 22d day of September, 1887.

J. S. FITZHUGH,
County Judge for Douglass County.

AFFIDAVIT OF G. A. TAYLOR.

In the Supreme Court of the United States.

Henry M. Dumbleton,
Complainant and Appellee,
vs.
F. P. Talkington, E. C. Jorgensen, and Daniel Marx,
Defendants and Appellants.

UNITED STATES OF AMERICA,
District of Oregon. } *ss:*

I, G. A. TAYLOR, being duly sworn, say that I am ex-sheriff of Douglas County, Oregon, and have been for 12 years a resident of Douglas County.

That I have known and been acquainted with the farm and land in controversy in the above-entitled suit, known as Winchester, during the above-mentioned period. The farm contains about one thousand acres, and has been worth about $12,500.00 for the last two years, and is appreciating in value.

G. A. TAYLOR.

Subscribed and sworn to before me this 21st day of September, 1887.

[SEAL.]

T. R. SHERIDAN, County Clerk.
By W. T. WRIGHT, Deputy Clerk.

Affidavit of Mr. W. F. Gilliam.

In the Supreme Court of the United States.

Henry M. Dumbleton,
Complainant and Appellee,
vs.
F. P. Talkington, F. C. Jorgensen, and Daniel Marx,
Defendants and Appellants.

United States of America,
District of Oregon. } *ss:*

I, W. F. Gilliam, being duly sworn, say that I am, and for more than thirty-four years last past have been a resident of Douglas County, Oregon, and during that time have been engaged in the business of ferrying and farming, and I am now engaged in the business of tending the Winchester ferry.

That I have known and been acquainted with the farm and land in controversy in the above-entitled suit, known as Winchester.

The farm contains about one thousand acres; is situated in a good farming district, and the land is good and was worth in April, 1886, the sum of $14,000.00, and this land was and it is now worth about $15,000.00.

That for about two years past real estate in this county has appreciated very much in value, and is now advancing, and sales at good prices have been and now are being made.

Wm. F. Gilliam.

Subscribed and sworn before me this 22d day of September, 1887.

[seal.] T. R. Sheridan, County Clerk..
By J. C. Aiken, Special Deputy Clerk.

AFFIDAVIT OF D. S. K. BUICK.

In the Supreme Court of the United States.

Henry M. Dumbleton,
Complainant and Appellee,
vs.
F. P. Talkington, E. C. Jorgensen, and Daniel Marx,
Defendants and Appellants.

UNITED STATES OF AMERICA,
District of Oregon. } *ss:*

I, D. S. K. BUICK, being duly sworn, say that I am now, and have been, a resident of Douglas County, Oregon, for more than twelve years, and during that time I have been engaged in business, and am now engaged in the business of buying and selling real estate, as manager of the firm of Buick & Benjamin. That I have known and been acquainted with the farm and land in controversy in the above-entitled suit, known as Winchester, during the above-mentioned period. The farm contains about one thousand acres, and has been worth about $12,509 for the last two years, and is appreciating in value.

D. S. K. BUICK.

Subscribed and sworn to before me September 21, 1887.

[SEAL.] T. R. SHERIDAN, County Clerk.

AFFIDAVIT OF THOMAS SMITH.

In the Supreme Court of the United States.

Henry M. Dumbleton,
Complainant and Appellee,
vs.
F. P. Talkington, E. C. Jorgensen, and Daniel Marx,
Defendants and Appellants.

UNITED STATES OF AMERICA,
District of Oregon. } *ss:*

I, THOMAS SMITH, being duly sworn, say that I have been a resident of Douglas County, Oregon, for more than

thirty-seven years; that I have been engaged in farming and stock raising during that time, and that I am now engaged in stock raising; that I have known and been acquainted with the farm and land in controversy in the above-entitled suit, known as Winchester, during the above-mentioned time, having owned a farm (until the last two months and a half) on the opposite side of the river during the above-mentioned time. Said Winchester farm contains about one thousand acres, and during the last two years has been worth at least $12,000.00, and is advancing.

THOMAS SMITH.

Subscribed and sworn to before me this 22d day of September, 1887.

[SEAL.] T. R. SHERIDAN, County Clerk.
By J. C. AIKEN, Special Deputy Clerk.

AFFIDAVIT OF JOHN JONES.

In the Supreme Court of the United States.

Henry M. Dumbleton,
Complainant and Appellee,
vs.
F. P. Talkington, E. C. Jorgensen, and Daniel Marx,
Defendants and Appellants.

UNITED STATES OF AMERICA, *District of Oregon.* } *ss:*

I, JOHN JONES, being duly sworn, say that I am, and for more than ten years last past have been, a resident of Douglas County, Oregon, and during that time have been engaged in the business of farmer, and I am now engaged in the business of farming.

That I have known and been acquainted with the farm and land in controversy in the above-entitled suit, known as Winchester.

The farm contains about one thousand acres, is situated in a good farming district, and the land is good, and was

worth, in April, 1886, the sum of $12, and this land was worth and could have been sold December, 1886, for $12, and it is now worth about $12.50 per acre—twelve thousand five hundred dollars.

That for about two years past real estate in this county has appreciated very much in value, and is now advancing, and sales at good prices have been, and are now being, made.

JOHN JONES.

Subscribed and sworn to before me September 21, 1887.

[SEAL.] T. R. SHERIDAN,
County Clerk of Douglas County,
State of Oregon.

AFFIDAVIT OF THOMAS GUTHRIE.

In the Supreme Court of the United States.

Henry M. Dumbleton,
Complainant and Appellee,
vs.
F. P. Talkington, E. C. Jorgensen, and Daniel Marx.
Defendants and Appellants.

UNITED STATES OF AMERICA, *District of Oregon.* } *ss:*

I, THOMAS GUTHRIE, being duly sworn, say that I am a resident of Douglas County, Oregon; that I am acquainted with the farm and land known as Winchester, which is in controversy in the above-entitled suit.

That on the 30th day of June, 1887, I bought of Thomas Smith about 1650 acres of land near the above-mentioned tract.

That I consider the Winchester farm worth about $14,000 dollars.

THOMAS GUTHRIE.

Subscribed and sworn to before me this 22d day of September, 1887.

[SEAL.] T. R. SHERIDAN, County Clerk.
By W. T. WRIGHT, Deputy Clerk.

AFFIDAVIT OF F. P. TALKINGTON.

In the Supreme Court of the United States.

Henry M. Dumbleton,
Complainant and Appellee,
vs.
F. P. Talkington, E. C. Jorgensen and Daniel Marx,
Defendants and Appellants.

UNITED STATES OF AMERICA,
District of Oregon, } *ss:*

I, F. P. TALKINGTON, being first duly sworn, say that I am one of the above-named defendants.

That at the time of the commencement of this suit, and for one year prior thereto, I knew of the property in controversy in this suit. It is situated in Douglas County, Oregon, and is known as "Winchester," and is more particularly described in the bill of complaint.

That I have been acquainted for three years in said county, and generally with the property therein, and of its value. That at and for a long time prior to the commencement of this suit, real property in said county was depressed in price, and in consequence of its isolated location, its markets and educational facilities, and the scarcity of money in the State, could not have been sold for much more than one-half its actual value, and, in fact, comparatively few sales were effected during that time.

That for about two years past, real estate has appreciated very much in value, and is now advancing, and sales at good prices have been and now are being made. This is in consequence of the general improvement and prosperity of the State, and of the large immigration from the Eastern States and from foreign countries, and the ease with which money can be obtained, and the investment of large sums in real estate and business, and the vigorous prosecution of railroad building.

In my opinion the interest in controversy at the commencement of this suit could not have been sold for more than $4,500. If there had been no litigation concerning this property it could have been sold in April, 1886, for $5,500, and it was worth and could have been sold in December, 1886, for $6,000.

It is now worth $7,000, and would readily bring that sum in the market if it was free from litigation.

I have never taken any timber from the place and have paid all taxes thereon and have only received from said place a total of $183.

F. P. TALKINGTON.

Subscribed and sworn to before me this September 24, 1887.

[SEAL] R. H. LAMSON,
Clerk U. S. Circuit Court, Oregon.

AFFIDAVIT OF CONSTANCE A. DAKYNS.

In the Supreme Court of the United States.

Henry M. Dumbleton,
Complainant and Appellee,
vs.
F. P. Talkington, F. C. Jorgensen, and Daniel Marx,
Defendants and Appellants.

UNITED STATES OF AMERICA, *District of Oregon.* } *ss:*

I, CONSTANCE A. DAKYNS, being duly sworn, say that I am, and have been for several years past, the owner of the undivided one half of that certain farm known as the Winchester Farm, in Douglas County, Oregon, containing about one thousand acres, and resided thereon for about eight years, and until about six weeks ago. I am thoroughly acquainted with its value now, and for the past eight years, and with the value of land generally in that vicinity.

That about the month of February (20th day) A. D. 1884, I sold and conveyed the other undivided half of said farm, being the land now in controversy in this suit, to Henry M. Dumbleton, the appellee in this suit, for the sum of seven thousand dollars, ($7,000,) which amount he paid me at that time, cash in hand.

That said undivided half, being the land in controversy in the suit, was then, at the date last above mentioned, of the reasonable value of seven thousand dollars, ($7,000,)

and has gradually increased in value ever since, in my estimation.

I am at present residing in the city of Portland, State of Oregon.

CONSTANCE A. DAKYNS.

Subscribed and sworn to before me this 22d day of October, 1887.

[SEAL.] JOHN D. WILCOX,
Notary Public in and for Oregon."

Upon this state of facts the question arises, and so far as I have been able to examine the authorities it is, under the *peculiar facts here presented*, one of first impression in this Court, whether the amount in controversy or the value of the matter in dispute in this Court in this case can properly be held to exceed in value the sum of $5,000.

It is conceded if this were an action wherein the plaintiff claimed a money demand of $7,000, the defendant had conceded in his answer he was owing $4,000, and the judgment of the Court had been for $5,000, *and no more*, that then clearly under the rulings of this Court neither the defendant nor the plaintiff could come to this Court, as the value of the matter in dispute in such a case would not be sufficient. This has, we concede, been frequently decided.

Thompson *v.* Butler, 95 U. S., 694.
Lamar *v.* Micon, 104 U. S., 465.

Here, however, the amount in controversy, or value of the matter in dispute, both *here* and in the Court below, is the *value of the land in controversy* at the date of the judgment. The plaintiff claiming the *whole of it as his property*, the defendant and appellant, Talkington, here insisting that *he owns it*, the question therefore arises, first, is that value for the purpose of jurisdiction here to be fixed by the sworn statement of the plaintiff in the Court below and appellee here, which was $7,000, or is it to be fixed by the defendant in

his answer in the Court below, which was $4,000, or is it controlled by the *incidental finding*, not judgment, of the Court below, which was $5,000, "*and no more*," or rather will not this Court consider *all* these circumstances in conjunction with the affidavits here presented, and from all these determine whether or not the actual money value of the land in dispute *here* in *this Court* does or does not exceed the sum of $5,000.

The *real* question for this Court is, it is submitted, as to the *value* of the land in controversy, or matter in dispute, in *this Court*, or rather, perhaps, what was the *value* of the *land in controversy* at the date of the rendition of the decree of the Court below.

If, as a *matter of fact*, the value of the land in question did on that date, November 8th, 1886, exceed $5,000, then clearly this Court has jurisdiction, and it is respectfully submitted that such value should not by this Court be held to be conclusively fixed by the *incidental finding* of the Court below, and for several reasons:

First. The finding as to value of the Court below was not, as will clearly appear from the record in this case, a *necessary finding*. It was simply *collateral* and *incidental* to the main question to be determined by the Court, which was simply to whom, under the facts and the law, should the land in controversy be decreed. The issue in the pleadings in reference to the value of the land was one that bore simply upon the *good faith of the transaction* by which Talkington obtained from Dumbleton a conveyance for the lands in controversy.

In this case the plaintiff sues for *certain property*, the value of which he states in his complaint is $7,000. The defendant, Talkington, says the property is his, and should be decreed to him; that he purchased it in good faith, at a certain time, by trading certain other property for it.

The *thing in controversy*, therefore, is the land sued for; the question for the Court below was, to which of the

parties *does the land sued for belong?* The decree of the Court was that it *belonged to the plaintiff.* The plaintiff, in his complaint, fixed the value of the thing in controversy in the Court below at $7,000.

It is respectfully insisted, therefore, under this state of facts—

First. That the plaintiff in the Court below and appellee here, if estoppel can operate at all in such a case, is *estopped* from insisting in this Court that the land in controversy here is of any *less value* than that sworn to by him in his complaint. He there swore it was of the value of $7,000 when the complaint was filed. The presumption is it was of greater value when the decree was rendered—nearly a year thereafter.

Second. That if not estopped, then the question is an open one, and inasmuch as the whole record, taken together is, upon the question of value, contradictory, uncertain, and unsatisfactory, the value must be ascertained by this Court from the record and the evidence submitted in the affidavits herein filed; and as no counter affidavits have been filed, it conclusively appears that the value of the land in controversy was at the date of the rendition of the decree, and the taking of this appeal, and now is, far in excess of $5,000.

The questions relating to jurisdiction where the claim is for a money demand, and the general issue is pleaded, and no set-off or counter-claim is set up; and in cases where set-offs and counter-claims are insisted on; as also in cases of replevin where there is a plea of property, and in replevin where the plea is that it was distrained for rent; and in cases where the action or suit is to recover, as in the case at bar, specific real property,—have been very definitely settled by this Court. And the rule applicable to each class of cases is *apparently* different from that applicable to any other class. And again:

By the later decisions of this Court, notably Hilton *v.*

Dickinson, (108 U. S., 165,) the rule has been settled that the matter in dispute on which the jurisdiction of this Court depends, is the matter in dispute "between the parties as the case stands upon the writ of error or appeal" in *this Court.*

This doctrine, in Gordon *v.* Ogden, (3 Peters, 33, decided in 1830,) left the question in doubt as to whether, under certain circumstances, a plaintiff in the lower Court did not, under the rule, have an advantage over his opponent in the matter of a right to a review of his case in this Court. This doubt was removed in Hilton *v.* Dickinson, U. S., *supra*, where the rule in a case of a *money demand* was thus stated by Chief-Justice Waite:

"Under this rule" (that is, the rule that the matter in dispute on which jurisdiction depends is the matter in dispute in this Court) "we have jurisdiction of a writ of error, or appeal by a plaintiff when he sues for as much as, or more, than our jurisdiction requires and recovers nothing, or recovers only a sum which, being deducted from the amount or value sued for, leaves a sum equal to or more than our jurisdictional limit, for which he failed to get a judgment or decree. And we have jurisdiction of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here, and when, having pleaded a set-off or counter-claim for enough to give us jurisdiction, he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed. In this connection, it is to be remarked that *the amount, as stated in the body of the declaration,* and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered in determining whether this Court can take jurisdiction."

The Finding of the Court below as to Value is not Conclusive on this Court.

It is earnestly insisted by counsel in his able brief filed herein, while admitting that it is the actual value of the

land in controversy in this Court that regulates the question of jurisdiction, that this value is unalterably and irrevocably fixed by the finding of the Court below, not, it will be remembered, by the *judgment* or *decree* of the Court below, because that was that the *land* in question was rightfully the property of the plaintiff, and the decree directed the defendant to reconvey it.

Surely this is not a sound position, as it has frequently been held by this Court that in many cases it is not the amount of the *judgment* in the Court below that governs the question of jurisdiction, but the *actual value* of the matter in dispute in this Court. Not unfrequently is it the case that the judgment of the Court below is for an amount far in excess of $5,000, and yet the actual value of the matter in controversy here is much less than $5,000, and in all such cases this Court would not have jurisdiction. And again, quite frequently does it occur that the judgment of the Court is much less that $5,000, and yet the value of the matter in dispute here is much more than $5,000, and hence in all such cases this Court would entertain jurisdiction, notwithstanding the fact that the judgment of the lower court was much less than the jurisdictional amount.

It is the amount *actually* in dispute in *this Court*, and not the amount of the *judgment* rendered in the Court below that confers jurisdiction. This was directly decided by this Court in the case of Tintsmon *v.* National Bank, 100 U. S., 6. In that case the plaintiff in the Court below claimed $8,233.79; the defendant admitted that he owed of this amount $5,099,59. The *judgment* was for *more* than $5,000. Mr. Chief Justice Waite, in delivering the opinion of the Court said:

"In Gray *v.* Blanchard (95 U. S., 564) we held that a case must be dismissed, if, on an examination of the whole record, it appeared that the value of the matter *actually* in dispute between the parties was less than our jurisdictional

amount. This writ of error was brought by the defendant below to reverse a judgment against him of *more than* $5,000; but on looking into the record we find that the case was heard on an agreed statement of facts in the nature of a special verdict, in which it appeared that the plaintiff claimed of the defendant $8,233.79, and interest from June 4, 1876. The defendant admitted that he owed of this amount $5,099.59, for which the plaintiff was entitled to a judgment. The only controversy was as to the liability of the defendant for the difference between what he admitted to be due and what the plaintiff claimed, or $3,134.20. This, then, is the amount actually in dispute, and as it is less than $5,000 we have no jurisdiction." (Downs *v.* Johnson, 110 U. S., 223.)

Suppose a plaintiff claims judgment for $8,000. The defendant denies that he is owing any more than $1,000, and pleads a set-off or counter-claim of $11,000, and judgment is rendered against the plaintiff for $3,000; then *clearly* the defendant would have a right to be heard in *this* Court, notwithstanding the *amount of the judgment is less than* $5,000, because the *actual matter in dispute* is $7,000.

It is respectfully submitted, therefore, the *finding* of the Court below as to the value of the land in controversy is not *conclusive* on this Court, and if not *conclusive*, and if the record leaves the question as to value in doubt, then this Court will hear affidavits—*not to controvert the record*, but rather for the purpose of making *plain* that which the record leaves in *uncertainty* and *doubt*.

In the case of The United States *v.* The Brig Union, 4 Cranch, 216, there had been an appraisement made by three sworn appraisers by order of the district judge, by which the brig Union was appraised at $1,800, the sloop Sally at $400, and the sloop Deborah at $600.

A motion to dismiss the appeal was made, and appellant

offered *one* witness, whom the Court permitted to testify *viva voce* in open Court as to the value.

It was contended by counsel for the appellee that this appraisement, being made by order of the Court below, was *conclusive* evidence of the *value of the matter in dispute.* It was insisted, on the contrary, by Mr. Attorney-General Rodney—*assuming* that the Court below could not by any act deprive this Court of jurisdiction, that—

"If the Court below cannot by any act oust this Court of its jurisdiction, much less can any of its officers or appraisers. If this valuation be *conclusive*, it puts it in the power of appraisers appointed by the Court below to deprive this Court of jurisdiction."

The Court, Chief Justice Marshall, in deciding the motion, said:

"The appraisal is *not conclusive evidence of the value*, but *in this case* it is the *best* evidence. It was made by officers of the Court, under its order, and was regularly returned and filed. It does not impeach the credibility of the witness now examined, for the value is a matter depending upon opinion, and with respect to which the judgments of men may honestly vary."

But not only so. A motion in this case was made the next day for a continuance of the cause and for leave to take affidavits respecting the value of the property.

To this counsel for the motion to dismiss said: "If this motion had been made *yesterday*, before the decision of the Court upon the *weight* of testimony, perhaps it might have been proper," but insisted the motion came too late.

Whereupon Chief Justice Marshall said:

"Cannot the United States sue out a new writ of error, *and take new affidavits* to show the cause to be within our jurisdiction? If so, perhaps the Court would not put the United States to that expense."

Upon the Attorney-General responding that the judg-

ment dismissing the appeal, in his judgment, would be final, the Court declined to grant the motion.

It will be observed, therefore, that Chief Justice Marshall proceeded in that case all the way through on the assumption that the *finding* or *ascertainment of value* of these vessels by the Court below, through the medium of appraisers, was *not conclusive on this Court.* And the point was finally conceded, also, by the attorney for the appellee.

It would be difficult, doubtless, in all the records of jurisprudence, to find a case which so forcibly illustrates the *un*wisdom of a rule which would permit an inferior Court to control the jurisdiction of an appellate tribunal in such a case as this—as the one now under consideration. Is it not a little remarkable, that in view of the different estimates placed upon this property, the Court should find the value to be *just* $5,000? But if that were *all* of the finding it would perhaps not be justly open to criticism, but when the Court below adds to this the words "*and no more,*" one might not perhaps be considered unreasonably censorious in suggesting that it seems to smack very strongly of an attempt upon the part of the Court below to deprive the defendant, *if possible*, of the privilege of having the case reviewed in this Court.

In the case of Richmond *v.* The City of Milwaukee, 21 How., 391, cited by opposing counsel for the purpose of showing that affidavits cannot be received, the *only* statement in the record as to value was made by the plaintiff in his complaint; this was not controverted in defendant's answer, and, therefore, admitted; and this Court very properly held affidavits could not be received. This is a very different case—the statements as to value in the record are strangely contradictory, and the question is left in doubt. But if this Court accepted the statement of the plaintiff as to value in the case of 21 Howard, *supra*, then

why not accept the sworn statement of the plaintiff and appellee here.

The learned counsel in his brief, (pages 17, 18,) says, in speaking on this very subject:

"No rules of estoppel are more firmly settled than those which hold litigants to their pleadings, and to facts established by their own witnesses."

Let this rule be enforced, as stated by counsel, and this motion to dismiss must be overruled, because, forsooth, his client has, in his complaint, as we have seen, solemnly sworn that the land in controversy is of the value of $7,000; that he paid that amount in cash for it; and *all his witnesses on the trial confirmed his statement.*

But if the record is uncertain and contradictory or unsatisfactory as to the question of value, this Court will hear affidavits upon that question. This rule of practice, we believe, is well settled.

In case Parker *v.* Morrill, (106 U. S., page 2,) which was a motion to dismiss because it did not appear by the record or otherwise that the value of the matter in dispute exceeded $5,000, His Honor Chief Justice Waite, in delivering the opinion of the Court dismissing the appeal, said:

"The brief in support of the motion was filed here on the 6th of May; that of the appellant was filed on the 7th of October. Notwithstanding the dismissal was claimed on account of the value of the matter in dispute, no attempt has been made by the appellant to supply the defect in the record by affidavits, as under our practice might have been done; but to defeat the motion he *relies entirely on the evidence of value to be found in the record.*"

Youngstown Bank *v.* Hughes, 106 U. S., 524.

"In this case, *supra*, the Court said "affidavits can only be used to furnish evidence of value not appearing on the face of the record when the nature of the matter in dis-

pute is such as to admit of an estimate of its value in money."

"Ordinarily," says Mr. Justice Matthews, in delivering the opinion of this Court in the case of Elgin *v.* Marshall, (106 U. S., 580,) "the value of the matter in dispute would appear in the pleadings *and judgment*, where the claim must be stated and determined; but where the recovery of *specific property—real or personal*—is sought, affidavits of value were permitted from the beginning, as a suitable mode of ascertaining the fact, and bringing it upon the record." (Williamson *v.* Kincaid, 4 Dall., 20; Crouse *v.* Stead, Id., 22; United States *v.* Brig Union, 4 Cranch, 216.)

The record shows that an appeal in this case has been allowed by the Court below, notwithstanding the *expression* of opinion by that Court in its findings to the effect that the land in controversy "was, and still is, of the value of five thousand dollars *and no more.*" Therefore the rule applies, as stated by Chief Justice Waite in Gage *v.* Pumpelly, 108 U. S., 164, where it was said:

"When an appeal has been allowed after a contest as to the value of the matter in dispute, and *there is evidence in the record which sustains our jurisdiction*, the appeal will *not* be dismissed simply because upon examination of all the affidavits we may be of the opinion that possibly the estimates acted upon below were too high."

In that case the Court below in allowing the appeal had declared, after hearing proofs as to the value of the land in controversy: "I have considered these proofs, and am much inclined to hold that the fair cash value of this property does *not* exceed $5,000, although it is true that *some* of the affidavits on the part of the defendant put the value much higher than that; but the affidavits on the part of the complainant refer to *actual sales* or *transactions*, which furnish a much more reliable basis of value than these opinions or speculative conclusions. *But I dislike*," remarked Judge

Blodgett, further, "*by any ruling of mine as to value, to deny an appeal to any party who seeks to review my findings upon the main questions in the case.* I shall, therefore, allow the appeal."

In that case, therefore, the Court below *really found* that the land in dispute was worth LESS than $5,000, but allowed the appeal; and yet the Court sustained jurisdiction, notwithstanding this expression of opinion as to value of the Court below, which, had it been followed or adopted, would have ousted jurisdiction.

The fact, furthermore, that in the one case, that just quoted, the Court below, although of the opinion the value was insufficient to confer jurisdiction on this Court, expressed a willingness that the party should have his appeal, and the benefit of the judgment of *this* Court upon the *question of value*, and that in the other, the case at bar, the Court sought to *deprive* this appellant of an appeal by finding that the land in dispute was of "the value of $5,000, *and no more*," and this, too, when not a solitary witness called for either plaintiff or defendant fixed the value *at* $5,000, cannot render dissimilar the questions involved in the two cases. In neither case is there a *money demand*. In each case the suit is to recover certain lands. The real question in each case for the Court to decide was, to whom—plaintiff or defendant—did the land in controversy belong? Whatever expression of opinion by the Court below as to the value of the land, whether it be as stated by Judge Blodgett in the one case, "I am much inclined to hold that the fair cash value of this property does not exceed $5,000," or as stated by Judge Deady in the case under consideration, that it is of "the value of $5,000, *and no more*," *can* not and *ought* not to conclude either the appellant or this Court. But on the contrary—

"When an appeal has been allowed after a contest as to the value of the matter in dispute, *and there is evidence in the record which sustains our jurisdiction*, the appeal will not

be dismissed simply because upon examination of all the affidavits we may be of the opinion that *possibly the estimates acted upon below were too high.*"

Gage *v.* Pumpelly, 108 U. S., 164.

In this case an appeal *has* been allowed, after a collateral contest as to the value of the matter in dispute. And is it not *true*, moreover, that, leaving out of consideration the affidavits now submitted, *there is evidence in the record which sustains jurisdiction?* It is conceded here that the plaintiff in the Court below averred in his verified complaint that the lands in dispute and sued for were of the value of $7,000. The averment is as follows:

"That said moiety and estate of your orator in and to said described lands and premises at all the times herein stated was, and now is, of great value, viz., of the *value of seven thousand dollars.*" (See brief of counsel for appellee, page *two*, appendix.)

But not only so: the plaintiff in the Court below and appellee here came upon the witness stand and testified under oath not only that the lands in controversy were worth $7,000; and that he had told the defendant that they were of that value at the time he was negotiating for its sale; but furthermore, that he had *actually paid that amount for them in cash a short time previously.* (See Record, page 76; also, page 25 of appendix to brief of counsel for appellee.) But still further, he called at least two witnesses, who testified the lands in controversy were of the value of $7,000, and there is no testimony tending to show that there had been any depreciation in the value of the property in dispute subsequent to the date of filing the complaint, or subsequent to the date when, according to his own sworn statements, the appellee paid $7,000 in cash for the same. But, on the contrary, *all* the testimony tends to show strongly that it had been constantly appreciating in value.

Aside, therefore, from any affidavits submitted here, the record, as made by the appellee himself in the Court below, shows not merely that *there is evidence which sustains jurisdiction*, but evidence of a conclusive nature, and of a character that should *estop* this appellee from questioning the jurisdiction of this Court on the ground that the value of the matter in dispute is less than $5,000.

May it please the Court, whatever may have been the exaggerations of statements of both plaintiff and defendants, or either of them, in the pleadings in the Court below as to value, in their efforts to show that each acted in good faith with the other, the question after all for this Court remains the same; that is, if it is made to appear to this Court, from the record—and it is submitted these affidavits are here properly as a part of the record—that the value of the matter in dispute here exceeds $5,000, then clearly this Court has jurisdiction irrespective of the question as to whether the plaintiff and defendants, or any of them, committed perjury in the Court below; and, while it is respectfully submitted that when a plaintiff in an action of ejectment or in a suit to recover specific real or personal property swears in his complaint that such property is of the value of $7,000, he should be bound by such statement, and be subjected to every jurisdiction to which it may lead him; that still, if this is not so, it is clearly apparent from the record, including the eight affidavits of disinterested witnesses, that the land in controversy was at the date of the decree in this Court, and ever since has been, of the value of not less than $6,250, while by a fair preponderance of evidence such value was then, and ever since has been, *seven thousand dollars*. It will be observed also in this connection that the affidavit of Mrs. Constance A. Dakyns shows that the appellee Dumbleton purchased this identical land from her just one year and eight days prior to the date when Dumbleton sold to Talkington,

and then paid her $7,000 cash in hand for the same. Such testimony is worth any amount of *opinions* as to value, and goes far to justify the correctness of the estimates of the *seven* other witnesses whose affidavits are filed herein, and who on an average place the value at date of decree, and ever since, at $7,000—some of them much above that. And it will be remembered, furthermore, that this Mrs. Dakyns was one of appellee's witnesses on the trial in the Court below, and there testified to the same thing, and that testimony is a part of the record here.

It must not be forgotten, moreover, as it appears from the record (see the findings of the Court in brief of counsel for appellee, appendix, page 30), that the land in controversy is the undivided one-half of *nearly one thousand acres of land*, near Roseburg, Oregon, in the heart of the Rogue River valley—about 960 acres.

The appellee presents no counter affidavits. Hence the *only* record *he* presents, as made by himself, is his own sworn statement in his complaint, and the sworn statement of all his witnesses at the trial in the Court below, to the effect that the land in controversy is of the value of *seven thousand dollars*, and that he paid that amount in cash for it.

The Appeal as to Marx and Jorgensen.

It is insisted by counsel for appellee that the amount in controversy as to the co-appellants Marx and Jorgensen, is measured by the amount of their mortgage, which is but for the sum of $890, and not by the value of the land covered by the mortgage. Grant that this is so, and as an abstract proposition I am not prepared to dispute the correctness of the general rule that when the object of a suit is to apply property worth more to the payment of a debt for less than the jurisdictional amount, it is the amount of the debt, and not the value of the property, that determines the jurisdiction, still it does not follow that the

appeal of Marx and Jorgensen should be dismissed—provided the value of the land in dispute is of a sufficient amount to entitle the defendant Talkington to an appeal, and for the following reasons:

This is not a motion to dismiss the appeal of Marx and Jorgensen, nor is it a motion to dismiss the appeal *as to them.* It is simply a "motion to *dismiss the appeal.*" The language of the motion is as follows: The appellee, by his attorney, first "suggests to the Honorable the Supreme Court that it appears upon the face of the record herein that the matter in dispute on this appeal does not exceed the sum or value of $5,000," and concludes as follows:

"Wherefore, appellee moves the Court that *said appeal be dismissed,* with costs and damages to appellee, on the ground that the matter in dispute in this Court on *said appeal* does not exceed the sum or value of $5,000."

In the case of the Rio Grande (19 Wall., 189), several material men joined in a libel against the steamer Rio Grande. The Circuit Court entered a decree, March 1st, 1873, as follows:

"That the libellants do have and recover from the steamboat the following sums, to wit: Wm. Otis, $1,508; Lyons and Keylind, $1,411.83; Joseph Hastings, $83.75; R. T. Port & Co., $121.25; G. B. & C. B. Gwin & Co., $713.14; with eight per cent. interest on said different amounts from August 1st, 1867, until paid."

The respondent appealed to this Court. A motion was made to dismiss the appeal, one ground being as follows:

"That this Court has no jurisdiction in the case, as the amount in dispute is less than $2,000."

This Court, Mr. Justice Clifford delivering the opinion, after disposing of another point, said:

"Nor can the motion be sustained for the other reason set forth, as it is certain that the decree against the appellants here in favor of *two* of the respective appellees exceeds

the sum of $2,000. True the sums received by the other three appellees respectively were not sufficient to give this Court jurisdiction, *but the motion is to dismiss the appeal*, which must be denied, as the decree in favor of the *two* libellants first named in the decree is, as it respects each of those, greater than $2,000, when the interest allowed by the Circuit Court to the date of the decree is included with the principal." (The Rio Grande, 19 Wall., 189.)

In the case at bar the *thing* in controversy is the land, as to *all the defendants*. It is quite immaterial to the appellee what becomes of the land, or how it is to be divided up or parcelled out as between the several defendants, or what their respective interests are in the event that *he* fails to obtain a decree that the land is his. And it is equally immaterial to plaintiff in the event the decree stands declaring the land his property. The plaintiff has seen proper to join these several defendants in this suit, charging, as he does, that Talkington has the legal title, and the defendants Marx and Jorgensen jointly an equitable title to the same; and he insists both these titles were, as to the plaintiff, obtained by fraud, and he prays he may be substituted to both. It is not a suit by a mortgagee to have his debt, less in amount than $5,000, made good as to land of greater value than $5,000; hence, it is insisted the rule invoked by counsel cannot apply, especially as there is no motion here to dismiss the appeal as to Marx and Jorgensen, but simply a motion "*to dismiss the appeal.*" If, then, the appeal is good as to Talkington, it is good as to all the defendants, unless the rule asserted in the case of the Rio Grande is set aside.

In ejectment against *two* defendants for *two* parcels of land, if each defendant claims only one parcel, the value of each parcel is the limit of appellate jurisdiction. (Tupper *v.* Wise, 110 U. S., 398; Lynch *v.* Bailey, *Id.*, 400.) ***But if both defendants jointly claim both parcels, the value of both is the test.*** (Friend *v.* Wise, 111 U. S., 797.)

Here the object of the suit is *not* to apply property worth more to the payment of a debt for less than the jurisdictional amount; in which case it is conceded the amount of the debt, and not the value of the property, would determine the jurisdiction of this Court. On the contrary, the suit in the case at bar is not by the creditor, but by a third party, who claims to own and recover the *whole estate*, as against *all these defendants*, some of whom claim the *legal* title, and some of whom claim the *equitable* title, to the *whole* of the premises in controversy. In other words, these defendants claim jointly to own the whole estate in dispute. Hence the value of the matter in dispute is, as to all these appellants, the *value of the land for which appellee obtained a decree in the Court below.*

Counsel has united with his motion to dismiss—as he of right may do—a motion to affirm. And it is suggested, with apparent candor, that this appeal was manifestly taken for delay; that the proceedings are frivolous and in bad faith. We *may* be in error, but are not prepared to admit we would insist, with as much earnestness as we have, that jurisdiction attaches in this Court unless we *believed*, at least, we were right. Believing, therefore, there is in the record of this case no color of right to a dismissal, and that therefore there can be neither dismissal nor affirmance, the motions are on our part respectfully submitted.

JOHN H. MITCHELL,
Attorney for Appellants.

123-745

123-745

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1887.

F. P. TALKINGTON, D. MARX, AND E. C. JORGENSEN,
Appellants,
vs.
HENRY M. DUMBLETON,
Respondent.

Now come the Appellants, by their Counsel, and move the court for leave to file herein in answer to the motion of Respondent—heretofore filed to dismiss this appeal, for the reason that the value of the land in controversy is not enough to confer jurisdiction, certain original affidavits as to value of such land, which originals are now here presented, and copies of which are herewith submitted in printed form, for convenience of the court, Counsel prays these affidavits may be filed at this time, in pursuance of a stipulation of Counsel heretofore filed, and that the question

as to their admissibility, be reserved and considered on hearing of motion to dismiss appeal as per said stipulation.

AFFIDAVIT OF T. R. SHERIDAN.

In the Supreme Court of the United States.

HENRY M. DUMBLETON,
Complainant and Appellee,
vs.
F. P. TALKINGTON, E. C. JORGENSEN, AND DANIEL MARX,
Defendants and Appellants.

United States of America,
District of Oregon. } ss.

I, T. R. SHERIDAN, being duly sworn, say that I have been for more than ten years a resident of Douglas county, Oregon, and am now County Clerk of said county.

That I am acquainted with the farm and land known as Winchester, which is in controversy in the above entitled suit.

That during the last two years said Winchester farm has been worth about $14,000.00, and is advancing in value.

T. R. SHERIDAN.

Subscribed and sworn to before me this 22d day of September, 1887.

J. S. FITZHUGH,
County Judge of Douglas County.

AFFIDAVIT OF G. A. TAYLOR.

In the Supreme Court of the United States.

HENRY M. DUMBLETON,
Complainant and Appellee.
vs.
F. P. TALKINGTON, E. C. JORGENSEN, AND DANIEL MARX,
Defendants and Appellants.

United States of America, District of Oregon. } ss.

I, G. A. TAYLOR, being duly sworn, say that I am ex-Sheriff of Douglas County, Oregon, and have been for 12 years a resident of Douglas County.

That I have known and been acquainted with the farm and land in controversy in the above entitled suit known as Winchester, during the above mentioned period. The farm contains about one thousand acres and has been worth about $12,500.00 for the last two years and is appreciating in value.

G. A. TAYLOR.

Subscribed and sworn to before me this 21st day of September, 1887.

[Seal]

T. R. SHERIDAN, County Clerk.
By W. T. Wright, Deputy Clerk.

AFFIDAVIT OF MR. W. F. GILLIAM.

In the Supreme Court of the United States.

HENRY M. DUMBLETON,
Complainant and Appellee,
vs.
F. P. TALKINGTON, F. C. JERGENSEN, AND DANIEL MARX,
Defendants and Appellants.

UNITED STATES OF AMERICA
DISTRICT OF OREGON. } ss.

I, W. F. GILLAM, being duly sworn, say that I am, and for more than thirty-four years last past, have been a resident of Douglas County, Oregon, and during that time have been engaged in the business of ferrying and farming, and I am now engaged in the business of tending the Winchester ferry.

That I have known and been acquainted with the farm and land in controversy in the above entitled suit, known as Winchester.

The farm contains about one thousand acres, is situated in a good farming district and the land is good and was worth in April, 1886, the sum of $14,000.00; and this land was and it is now worth about $15,000.00.

That for about two years past, real estate in this county has appreciated very much in value, and is now advancing and sales at good prices have been and now are being made.

WM. F. GILLIAM.

Subscribed and sworn before me, this 22nd day of September, 1887.

[Seal] T. R. SHERIDAN, County Clerk.
By J. C. AIKEN, Special Deputy Clerk.

AFFIDAVIT OF D. S. K. BUICK.

In the Supreme Court of the United States.

HENRY M. DUMBLETON,
Complainant and Appellee,
vs.
F. P. TALKINGTON, E. C. JORGENSEN, AND DANIEL MARX,
Defendants and Appellants.

UNITED STATES OF AMERICA
DISTRICT OF OREGON. } ss.

I, D. S. K. BUICK, being duly sworn, say that I am now, and have been a resident of Douglas County, Oregon, for more than twelve years, and during that time I have been engaged in business, and am now engaged in the business of buying and selling Real Estate as manager of the firm of Buick & Benjamin. That I have known and been acquainted with the farm and land in controversy in the above entitled suit, known as Winchester during the above mentioned period. The farm contains about one thousand acres and has been worth about $12,500 for the last two years and is appreciating in value.

D. S. K. BUICK.

Subscribed and sworn to before me Sept. 21, 1887,

[Seal] T. R. SHERIDAN, County Clerk.

AFFIDAVIT OF THOMAS SMITH.

In the Supreme Court of the United States.

HENRY M. DUMBLETON,
Complainant and Appellee,
vs.
F. P. TALKINGTON, E. C. JORGENSEN, AND DANIEL MARX,
Defendants and Appellants.

United States of America,
District of Oregon. } ss.

I, THOMAS SMITH, being duly sworn, say that I have been a resident of Douglas County, Oregon, for more than 37 years, that I have been engaged in farming and stock raising during that time, and that I am now engaged in stock raising. That I have known and been acquainted with the farm and land in controversy in the above entitled suit, known as Winchester, during the above mentioned time, having owned a farm (until the last two months and a half) on the opposite side of the river during the above mentioned time. Said Winchester farm contains about one thousand acres and during the last two years has been worth at least $12,000.00, and is advancing.

THOMAS SMITH.

Subscribed and sworn to before me this 22d day of September, 1887.

[Seal] T. R. SHERIDAN, County Clerk.
By J. C. Aikin, Special Deputy Clerk.

AFFIDAVIT OF JOHN JONES.

In the Supreme Court of the United States.

HENRY M. DUMBLETON,
Complainant and Appellee
vs.
F. P. TALKINGTON, E. C. JORGENSEN, AND DANIEL MARX,
Defendants and Appellants,

UNITED STATES OF AMERICA
DISTRICT OF OREGON } ss.

I, JOHN JONES, being duly sworn, say that I am, and and for more than ten years last past have been a resident of Douglas County, Oregon, and during that time have been engaged in the business of farmer, and I am now engaged in the business of farming.

That I have known and been acquainted with the farm and land in controversy in the above entitled suit, known as Winchester.

The farm contains about one thousand acres, is situated in a good farming district and the land is good and was worth in April, 1886, the sum of $12, and this land was worth and could have been sold December, 1886, for $12, and it is now worth about $12.50 per acre, twelve thousand five hundred dollars.

That for about two years past real estate in this county has appreciated very much in value, and is now advancing, and sales at good prices have been and are now being made.

JOHN JONES.

Subscribed and sworn to before me, Sept. 21, 1887.

[Seal] T. R. SHERIDAN,
County Clerk of Douglas County,
State of Oregon.

AFFIDAVIT OF THOMAS GUTHRIE.

In the Supreme Court of the United States.

HENRY M. DUMBLETON,
Complainant and Appellee,
vs.
F. P. TALKINGTON, E. C. JORGENSEN, AND DANIEL MARX,
Defendants and Appellants.

United States of America, District of Oregon. } ss.

I, THOMAS GUTHRIE, being duly sworn, say that I am a resident of Douglas County, Oregon, that I am acquainted with the farm and land known as Winchester, which is in controversy in the above entitled suit.

That on the 30th day of June, 1887, I bought of Thomas Smith about 1650 acres of land near the above mentioned tract.

That I consider the Winchester farm worth about $14,000.00 dollars.

THOMAS GUTHRIE.

Subscribed and sworn to before me this 22d day of September, 1887.

[Seal] T. R. SHERIDAN, County Clerk.
By W. T. Wright, Deputy Clerk.

AFFIDAVIT OF F. P. TALKINGTON.

In the Supreme Court of the United States.

HENEY M. DUMBLETON,
Complainant and Appellee.
vs
F. P. TALKINGTON, E. C. JORGENSEN AND DANIEL MARX,
Defendants and Appellants,

UNITED STATES of AMERICA,
DISTRICT of OREGON } ss

I, F. P. Talkington, being first duly sworn, say that I am one of the above named Defendants.

That at the time of the commencement of this suit, and for one year prior thereto, I knew of the property in controversy in this suit. It is situated in Douglas County, Oregon, and is known as "Winchester", and is more particularly described in the bill of complaint.

That I have been acquainted for three years in said County, and generally with the property therein, and of its value. That at and for a long time prior to the commencement of this suit, real property in said County was depressed in price and in consequence of its isolated location, its markets and educational facilities, and the scarcity of money in the State, could not have been sold for much more than one half its actual value, and in fact, comparatively few sales were effected during that time.

That for about two years past, real estate has appreciated very much in value, and is now advancing and sales at good prices have been and now are being made. This is in consequence of the general improvment and prosperity of the State, and of the large immigration from the Eastern States, and from foreign countries, and the ease with which money can be obtained, and the investment of large sums in real estate and business, and the vigorous prosecution of rail road building.

In my opinion the interest in controversy at the commencement of this suit could not have been sold for more than $4,500. If there had been no litigation concerning this property it could have been sold in April, 1886 for $5,500, and it was worth and could have been sold in December, 1886, for $6,000.

It is now worth $7,000, and would readily bring that sum in the market if it was free from litigation.

I have never taken any timber from the place and have paid all taxes thereon and have only received from said place a total of $183.

F. P. TALKINGTON

Subscribed and sworn to before me this September 24, 1887.

[Seal] R. H. LAMSON,

Clerk U. S. Circuit Court, Oregon.

AFFIDAVIT OF CONSTANCE A. DAKYNS.

In the Supreme Court of the United States.

HENRY M. DUMBLETON,
Complainant and Appellee,
vs.
F. P. TALKINGTON, F. C. JERGENSEN, AND DANIEL MARX,
Defendants and Appellants.

UNITED STATES OF AMERICA
DISTRICT OF OREGON. } ss.

I, CONSTANCE A. DAKYNS, being duly sworn say, that I am, and have been for several years past, the owner of the undivided one-half of that certain farm known as the Winchester Farm, in Douglas County, Oregon, containing about one thousand acres, and resided thereon for about eight years, and until about six weeks ago. I am thoroughly acquainted with its value now, and for the past eight years, and with the value of land generally in that vicinity.

That about the month of February (20th day,) A. D. 1884, I sold and conveyed the other undivided half of said farm, being the land now in controversy, in this suit, to Henry M. Dumbleton, the appellee in this suit, for the sum of Seven Thousand Dollars, ($7,000,) which amount he paid me at that time, cash in hand.

That said undivided half, being the land in controversy in the suit, was then, at the date last above mentioned, of the reasonable value of Seven Thousand Dollars ($7,000), and has gradually increased in value ever since, in my estimation.

I am at present residing in the City of Portland, State of Oregon.

CONSTANCE A. DAKYNS.

Subscribed and sworn to before me, this 22nd day of October, 1887.

[Seal] JOHN D. WILCOX,

Notary Public in and for Oregon.

23-7415

Office Supreme Court U. S.
FILED.
DEC 15 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

F. P. TALKINGTON, *et al. Appellant*
v.
HENRY M. DUMBLETON, *Appellee.*
No. 968.

Appellee's Response to Brief of Appellant, on Motion to Dismiss Appeal:

The exceptional and probably unprecedented criticism which the distinguished attorney for appellants has assumed to make upon the findings of the Judge who tried the cause, and the surprising attack made upon the motives, or purpose of one so generally and so highly esteemed, both as a citizen and a Judge prompts, though it may not merit, a reply.

It is assumed and asserted! that this Judge, who has presided over a busy court for so many years, in determining a material issue of fact "sought to deprive this appellant of an appeal!"

This unwarranted statement, twice urged, is bottomed on the use of the words "and no more" in the finding of the value of the interest in the land to be $5,000. Let my learned Brother, strike them out and he is not benefited. Their presence adds not an atom of weight to appellee's case; they do appellants no harm.

Excepting a memorandum containing the results of computation and accounting between the parties, the decision below, consisting of a full review of the evidence, was rendered orally and therein the value of complainant's interest in the lands involved was found *not to exceed* $5,000; the computation of rents, interest, &c., was made upon that basis, and complainant's attorneys were instructed to draw findings in accordance with this oral announcement, which being done in the order of recitals in the pleadings, and following as nearly as brevity would permit the language of the Judge in his oral announcement, the words: "is of the value of $5,000 and no more" were used. The Judge in his subsequent revision probably overlooked the three words which, (though according to the fact found) were literally and technically; redundant and which have called out these repeated animadversions.

If appellant's position in argument here is the true one, then their criticism is neither pertinent, or defensible. If the finding on the point is a mere incident, why discuss it in such sharp terms? Appellants labored earnestly at the trial to convince the court, by plea, and evidence, and argument, that the moiety in the lands did not exceed $4,000 in value, that they should be held to account for no greater value, and that equivalent consideration passed therefor. Successful in some degree, will they be permitted here not only to prove their insincerity before that Judge at the trial, but thus, or at all, call in question the purity of the motives, or the honor of the Judge?

It is not remarkable that appellants have no precedent, and that this is a case of first impression here. It should be the last of its kind. Hence appellee's motion for dismissal and for affirmance and damages, which it is conceded "he of right may do."

The controversy presented in defense below, has been lost sight of in argument here. Defendant's denials in making up the issues and trying the case defeats appellate jurisdiction as to them, for appellee acquiesces in the judgment.

Appellee has the right to object to the use of the affidavits here. He cannot use them at a re-trial of the cause here. Appellants cannot use them at a hearing on the merits—would not if they could. Shall a man be forsworn in a Court of Justice and thereby and thereon be accorded an advantage over his adversary? shall he blow hot and cold, swear and forswear, and be heard with patience, or permitted to remain in court?

This is a protest against which estoppel does not lie. Appellee is not here invoking jurisdiction, but protesting against the unprecedented proceedings on the other side.

By such proceedings and doings he has been delayed and subjected to heavy expenses, including the printing of much of the record. He again and finally urges his claim for affirmance and some compensation in damages.

Very respectfully submitted,

FRANK V. DRAKE,

Attorney for Appellee.